116-461

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1222.

THE LONDON ASSURANCE CORPORATION, PLAINTIFF IN ERROR,

vs.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, AND EDWARD D. EVERETT, PARTNERS AS DRENNEN, STARR AND EVERETT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED NOVEMBER 21, 1885.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, partners in business under the firm name and style of Drennen, Starr & Everett, as plaintiffs, and The London Assurance Corporation, as defendant, a manifest error hath happened, to the great damage of the said defendant, The London Assurance Corporation, as is said, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 23rd day of October, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the 110th year.

[U. S. Circuit Court Seal, Dist. of Minnesota.]

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

b *The Answer of the Judges of the Circuit Court of the United States for the District of Minnesota, in the Eighth Circuit, in within Writ mentioned.*

UNITED STATES OF AMERICA, }
District of Minnesota, } *ss:*

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America, within mentioned, in a certain schedule to this writ annexed, marked "A," as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this 23rd day of October, in the year of our Lord one

thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and tenth year.

[U. S. Circuit Court Seal, Dist. of Minnesota.]

OSCAR B. HILLIS,
Clerk U. S. Circuit Court, Dist. of Minnesota.

c The United States of America to Eugene J. A. Drennen and Edward D. Everett, defendants in error, and L. J. C. Drennen, their attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 3d Monday of the term, to wit, the 26th day of October, A. D. 1885, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, district of Minnesota, wherein The London Assurance Corporation is plaintiff in error and you are defendants in error, to show cause, if any there are, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. R. Nelson, one of the judges of the circuit court of the United States for the district of Minnesota, this thirty-third day of October, A. D. 1885.

R. R. NELSON, *Judge.*

d [Endorsed:] Ent. C, 633, law C. U. S. circuit court, dist of Minnesota. Eugene J. A. Drennan *et al. vs.* London Assurance Corporation. Filed Oct. 23, 1885. Oscar B. Hillis. Citation. Due service of citation accepted and thirty days' notice waived this 23d day of October, A. D. 1885. L. J. C. Drennen, plff's atty.

1 EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. Everett, Partners as Drennen, Starr & Everett, Plaintiffs in Error,

vs.

THE LONDON ASSURANCE CORPORATION.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota of the June term of said court held in the city of St. Paul in said district in the year of our Lord 1885, and of our Independence the 110th year.

Be it remembered that on the 31st day of May, A. D. 1884, came the defendant above named, by Cameron, Losey & Bunn and C. K. Davis, its attorneys, and filed in the clerk's office of said court a return from the district court of Hennepin county, State of Minnesota, in words and figures following, to wit:

2 *Summons.*

STATE OF MINNESOTA, } ss:
County of Hennepin, }

District Court, Fourth Judicial District.

EUGENE J. A. DRENNEN, FREDERICK W, STARR, and EDWARD D. Everett, Partners in Business Under the Firm Name and Style of Brennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION, Defendant.

The State of Minnesota to the above-named defendant:

You, The London Assurance Corporation, are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, a copy of which is attached hereto, and is herewith served upon you, and to serve a copy of your answer to said complaint on the subscriber, at his office, in the city of Minneapolis, in the county of Hennepin, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for six thousand dollars, with interest thereon from the 12th day of November, 1883, at the rate of seven per cent. per annum, together with the costs and disbursements herein.

Dated January 8th, A. D. 1884.

L. J. C. DRENNEN,
Plaintiffs' Attorney, Minneapolis, Minn.

Complaint.

STATE OF MINNESOTA, *Hennepin County:*

District Court, Fourth District.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. Everett, Partners in Business Under the Firm Name and Style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION, Defendant.

The plaintiffs, Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, complain of the above-named defendant, and allege that at the time of making each of the contracts of insurance hereinafter referred to they were, ever since have been, and are now partners in business under the firm name and style of Drennen, Starr and Everett, and that at and during all said time the defendant was and is a corporation and insurance company, created, organized, and existing under the laws of Great Britain under the name of the London Assurance Corporation, and doing business as such at its agency in the city of Minneapolis, in said State of Minnesota.

3 Plaintiffs allege that at said Hennepin county, on the 10th day of March, A. D. 1883, in consideration of $10.00 then paid defendant by plaintiffs therefor, defendant made, executed, and delivered to plaintiffs, under their firm name aforesaid, its certain policy of insurance in writing, a copy of which is attached to this complaint, marked Exhibit "A," and is hereby referred to as a part thereof, and thereby defendant insured plaintiffs against any loss or damage by fire for one year from said last-mentioned date to the amount of $1.000,000 on their general stock of merchandise while in the building therein referred to; that afterwards, and before the destruction of the merchandise, as hereinafter set forth, in the consideration of the additional sum of $2.30 paid defendant by plaintiff therefor, defendant consented to and did insure by amendment to said policy and further agreement the same said merchandise while in premises different from those in which it was situate when first insured by said policy, which said consent, amendment, and additional agreement was in writing, and was attached to said policy, and a copy thereof appears in said Exhibit "A," and is also made part of this complaint.

Plaintiffs also allege that at said county of Hennepin, also on said 10th day of March, 1883, in consideration of the additional sum of $55.00 then paid defendant therefor by plaintiffs, defendant made, executed, and delivered to plaintiffs under their said firm name its certain other policy of insurance in writing, a copy of which is also attached to this complaint, marked Exhibit "B," and is here referred to as a part hereof, and defendant thereby insured plaintiffs against any loss or damage by fire for one year from said last-mentioned date to the amount of $5,000.00 in addition to the amount first hereinbefore referred to on their said general stock of merchandise in said second policy described while in the building therein referred to. That afterwards and before the destruction of said merchandise, as hereinafter set forth, in consideration of an additional payment of $8.25 made by plaintiffs to defendants therefor, defendant consented to and did insure by amendment to said policy hereinbefore lastly referred to and further agreement the same merchandise in premises different from those in which it was situate when first insured by said policy, which said consent, amendment, and additional agreement was in writing, and was attached to said policy, and a copy thereof appears in said Exhibit "B," and is here referred to as part of this complaint. Plaintiffs allege that at the time of making said insurance, and from thence until the happening of the fire hereinafter mentioned, said plaintiffs were the owners of said insured property, which at the time of said fire was of the value of $123,000.00 and more, and at the said time the total value of said property and merchandise largely exceeded all the insurance thereon.

Plaintiffs allege that on the 29th day of July, 1883, said stock of merchandise and property so injured as aforesaid, and while owned by them and while contained in the premises in said policies as amended as aforesaid described, was accidentally, partially, and almost wholly destroyed by fire, and was thereby damaged, with-

4 out plaintiff's fault, to the amount of $117,715.45. That notice of said loss was immediately thereafter given to said defendant, and on or about the 13th day of September, 1883, plaintiff rendered to defendant at its office in New York a particular account and proof of said loss, signed and sworn to by said plaintiffs in the manner required by said policies, and produced, together with said account and proof, a certificate under the hand and seal of a notary public nearest the place of said fire, not concerned in said loss as a creditor or otherwise, nor related to the assured, stating that he had examined the circumstances attending said loss, knew the character and circumstances of the assured, and verily believed said plaintiffs had without fraud sustained loss on the property insured as aforesaid to the amount of $117,715.46, and plaintiffs performed all the conditions required of them by said policies respectively.

Plaintiffs allege they had at the time of said fire other policies of insurance on said merchandise in addition to those hereinbefore referred to issued by defendant, amounting at the time of said fire to the sum of $91,000.00 and no more. Plaintiffs allege there is due them from said defendant on account of the contracts of insurance, fire and loss, as aforesaid, the sum of $6,000, which defendant has not paid, nor any part thereof, though often requested so to do.

Wherefore plaintiffs ask for a judgment against said defendant for said sum of $6,000.00, with interest thereon at the rate of seven per cent. per annum from the 12th day of November, A. D. 1883, and for their costs and disbursements in this behalf expended.

L. J. C. DRENNEN,
Attorneys for Plaintiffs, Minneapolis, Minnesota.
SHAW & CRAY,
Of Counsel for Pl'ffs, Minneapolis, Minnesota.

UNITED STATES BRANCH OF THE LONDON ASSURANCE.

Incorporated by Royal Charter, 1720.

No. 670,009—874. Sum assured, $1,000.

Head office, 7 Royal Exchange, London, E. C.
New York office, No. 88 Wall street.

This policy of insurance witnesseth, that Drennen, Starr, and Everett having paid to the London Assurance Corporation of London the sum of ten dollars for insurance from loss or damage by fire (subject to the agreements and conditions herein contained) of the property hereinafter described, to the amount hereinafter mentioned, not exceeding upon any one article the sum specified on such article, namely:

One thousand dollars, as follows: On their general stock of merchandise, consisting principally of crockery, china, glassware, silver, and plated ware, cutlery, and such other merchandise usually kept for sale in a crockery store, all while contained in the one-story brick, slate-roof freight warehouse, and platform belonging thereto,
5 of the Chicago, Milwaukee and St. Paul Railroad Co., situate on 3rd avenue S., bet. 2nd St. and Washington avenue.

Now, know all men by these presents, that the said corporation hereby agrees to make good unto the said assured, their executors, administrators, and assigns, all such immediate loss or damage not exceeding in amount the sum or sums insured as above specified, nor the interest of the insured in the property, except as herein provided, as shall happen by fire to the property so specified from the 10th day of March, one thousand eight hundred and eighty-three, at twelve o'clock at noon, to the 10th day of March, one thousand eight hundred and eighty-four, at twelve o'clock at noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at the office of the corporation, in New York, in accordance with the terms and provisions of this policy, unless the property be replaced or the corporation shall have given notice of their intention to rebuild or repair the damaged premises.

1. If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this contract, and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in written application or otherwise; or if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the corporation written hereon; or if the above-mentioned premises shall be occupied or used so as to increase the risk, or became vacant or unoccupied, and so remained with the knowledge of the assured, without notice to and consent of this corporation in writing; or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the assent of this corporation endorsed hereon; or if it be a manufacturing establishment running in whole or in part over or extra time, or running at night, or if it shall cease to be operated, without special agreement endorsed on this policy; or if the property be sold or transferred; or any change takes place in title or possession (except by succession by reason of the death of the insured), whether by legal process or judicial decree or voluntary transfer or conveyance; or if this policy shall be assigned before a loss, without the consent of the corporation endorsed hereon; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy; or if the assured shall keep gunpowder, fireworks, nitro-glycerine, phosphorous, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzoic, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils, without written
6 permission in this policy, then, and in every such case, this policy shall be void. Kerosene oil, however, may be used for lights in dwellings, stores, churches, and school houses, and kept for sale

in stores in quantities not exceeding five barrels—to be drawn by daylight only.

2. This insurance does not apply to or cover jewels, plates, watches, musical or scientific instruments (piano-fortes in dwellings excepted), ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture frames, sculpture, casts, models, or curiosities, unless particularly specified in this policy. This corporation shall not be liable, by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid; nor for loss by theft at or after a fire, nor for money or bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind; nor for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power; nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire; nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist; nor for any loss caused by the explosion of gunpowder, or any explosive substance; nor by lightning, or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the casualty by explosion or lightning.

3. If a building shall fall, except as a result of a fire, all insurance by this corporation on it or its contents shall immediately cease and determine.

4. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the corporation, and so expressed in the written part of this policy, otherwise the policy shall be void. When property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate. Goods held on storage must be separately and specifically insured.

5. In case the use or occupation of the above-mentioned premises, at any time during the period for which this policy would otherwise continue in force, shall be so changed as to increase the risk thereupon, except as may be hereafter agreed to by this corporation, in writing upon this policy, from thenceforth, so long as the same shall be used, this policy shall be of no force or effect.

6. The best endeavors of the assured shall be used in saving and protecting the property from damage at and after the fire; and in case of failure so to do this corporation will not be liable for damage caused by such failure; and there can be no abandonment to the corporation of the property insured.

The use of general terms, or anything less than a distinct, specific agreement, clearly expressed, and endorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

7 7. In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this corporation no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon; and it is hereby declared and agreed that in the case of the assured holding any other policy in this or any other company on the property insured, subject to the conditions of average, this policy shall be subject to average in like manner. Any floating policy attaching, in whole or in part, to the property covered by this policy shall, as between the insured and this corporation, be considered as contributing insurance for the full amount of such policy, and liable as such to pay *pro rata* any loss, total or partial, on the property insured.

Reinsurance, in case of loss, to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company.

8. This insurance may be terminated at any time at the request of the assured, in which case the corporation shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the corporation, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy.

9. Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the corporation, and, as soon thereafter as possible, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon, also the actual cash value of the property and their interest therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss, when and how the fire originated, and shall also produce a certificate under the hand and seal of a magistrate or notary public (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations under oath, by any person appointed by the corporation, and subscribe to such examinations when reduced in writing, and shall also produce their books of account and other vouchers, and exhibit the same for examination at the office of the corporation, and permit extracts and copies thereof to be made; the assured shall also produce certified copies of all bills and invoices, the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination to any person or persons named by the corporation.

When personal property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various

8 articles according to their various kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the corporation of the whole, naming the quantity, quality, and cost of each article. The amount of sound value and of damage shall then be ascertained by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise, nor related to the assured or sufferers), to be mutually appointed by the assured and the corporation; their report, in writing, to be made under oath before any magistrate or other properly commissioned person; one-half of the appraisers' fees to be paid by the assured. The corporation reserves the right to take the whole or any part of the articles at their appraised value; and until such proofs, declarations, and certificates are produced, and examinations and appraisals are permitted by the claimants, the loss shall not be payable.

In case of loss of property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, together with their respective interests therein. If this policy is made payable, in case of a loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured. All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this corporation under this policy.

But provided, in case differences shall arise touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award, in writing, shall be binding on the parties as to the amount of such loss of damage, but shall not decide the liability of the corporation under this policy; and provided further, that it shall be optional with the corporation to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention to do so within thirty days after the receipt of the proofs herein required; and in all cases, whether this corporation elect to build or not, the insured shall, if required, furnish plans and specifications of the buildings destroyed.

The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made to ascertain the actual cash value.

Where property insured by this corporation is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured and the insurers, in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

10. This insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided the premium

therefor is paid and endorsed on this policy or a receipt given
9 for the same, and it shall be considered as continued under the original representation, and for the original amounts and divisions, unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the corporation by the assured at the time of renewal, this policy and renewal shall be void.

11. It is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by this corporation, shall be deemed to be the agent of the assured named in this policy, and not of this corporation under any circumstances whatever, or in any transaction relating to this insurance.

12. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this corporation, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this corporation after the expiration of the aforesaid twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

Gas.—The generating or evaporating within the building, or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting, is prohibited under this policy, unless permitted in writing hereon.

Fences and other yard fixtures, also store furniture and fixtures, are not insured under the within policy, unless separately, as specifically mentioned.

Plate-glass doors and windows, when the plates are of the dimensions of nine square feet or more, are not covered by insurance on building, but must be separately and specifically insured.

Frescoed work, or gilding on walls or ceilings, is not covered by insurance on the building, but must be separately and specifically insured.

Builders' risk.—The working of carpenters, roofers, tinsmiths, gasfitters, plumbers, or other mechanics in building, altering, or repairing the premises named in this policy will vitiate the same, unless permission for such work be endorsed in writing hereon, except in dwelling-houses only, where five days are allowed in any one year for incidental repairs, without notice or endorsement.

Goods in show-windows, where lights are used, must be separately and specifically insured, otherwise they are not protected by this policy.

And it is hereby understood and agreed by and between this corporation and the assured that this policy is made and accepted in reference to the foregoing terms and conditions, and to the classes of hazard and memoranda printed on the back of this policy, which is hereby declared to be a part of this contract, and to be used and resorted to in order to determine the rights and obligations of the

parties hereto, in all cases not herein otherwise specially provided for in writing.

In witness whereof the corporation of the London Assurance have caused these presents to be signed by their secretary, in the city of New York.

Countersigned at Minneapolis this 10th day of March, A. D. 1883.

I. C. SEELEY, *Agent.*

B. LOCKWOOD, *Secretary.*

(Attached upon the face of the said policy is the following:)

June 1, '83.—From and after date the form of this policy is amended to read as follows: "And in consideration of an increase of hazard $2.30 additional premium is hereby charged the assured."

I. C. SEELEY, *Agent.*

Drennen, Starr & Everett.

$1,000.00 on their general stock of merchandise, consisting principally of crockery, china, glassware, silver and plated ware, cutlery, and such other merchandise usually kept for sale in a crockery store. All which contained in the five-story and basement store and brick, gravel-roof store-building and under sidewalk adjoint thereto, situate Nos. 509 and 511 Nicollet avenue, Minneapolis, Minn., and known as the Syndicate Block. Permission given assured to keep for sale not to exceed five barrels of kerosene oil, which shall be of not less than U. S. standard of 110 degrees, not to be handled or sold by artificial light within the distance of 15 feet, and to use electric lights in premises herein insured.

Other insurance permitted.

This slip attached to and made a part of the policy No. 670,009—874 of the London Assurance Corporation of London, England.

I. C. SEELEY, *Agent.*

UNITED STATES BRANCH OF THE LONDON ASSURANCE.

Incorporated by Royal Charter, 1720.

No. 670,008. Sum Assured, $5,000.

Head office, 7 Royal Exchange, London, E. C.

New York office, No. 88 Wall street.

This policy of insurance witnesseth: That Drennen, Starr and Everett having paid to the London Assurance Corporation of London the sum of fifty-five and $\frac{00}{100}$ dollars for insurance from loss or damage by fire (subject to agreements and conditions herein contained) of the property hereinafter described to the amount hereinafter mentioned, not exceeding upon any one article the sum specified upon such article, namely, five thousand dollars, as per printed form attached hereto—Drennen, Starr and Everett, five thousand dollars—on their general stock of merchandise, consisting principally of crockery, china, glassware, silver and plated ware, cutlery, and such other merchandise usually kept for sale in a crockery

store, all while contained in the five-story basement, stone and
11 brick, gravel roof store-building and under sidewalks adjacent thereto, situate Nos. 509 and 511 Niccolet avenue, Minneapolis, Minn., known as the Syndicate Block. Permission given assured to keep for sale not to exceed five barrels of kerosene oil, which shall be of not less than the U. S. standard, 110 degrees, not to be handled or sold by artificial light within the distance of 15 feet, and to use electric lights in premises herein insured; other insurance permitted. Now, know all men by these presents that the said corporation hereby agree to make good unto the assured, their executors, administrators, and assigns, all such loss immediate or damage not exceeding in amount the sum or sums insured as above specified, nor the interest of the insured in the property, except as herein provided, as shall happen by fire to the property so specified from the 10th day of March, one thousand eight hundred and eighty-three, at twelve o'clock at noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at the office of the corporation in New York, in accordance with the terms and provisions of this policy, unless the property be replaced or the corporation shall have given notice of their intention to rebuild or repair the damaged premises.

1. If an application, survey, plan, or description of the property herein insured is referred to in this policy such application, survey, plan, or description shall be considered a part of this contract and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in a written application or otherwise; or if the assured shall have or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of the corporation written hereon; or if the above-mentioned premises shall be occupied or used so as to increase the risk or become vacant or unoccupied, without notice to and consent of this corporation in writing; or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the assent of this corporation endorsed hereon; or if it be a manufacturing establishment, running in whole or in part, over or extra time, or running at night, or if it shall cease to be operated, without special agreement endorsed on this policy; or if the property be sold or transferred, or any change takes place in title or possession (except by succession by reason of the death of the insured), whether by legal process, or judicial decree, or voluntary transfer or conveyance; or if this policy shall be assigned before a loss, without the consent of the corporation endorsed hereon; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy; or if the assured shall keep gunpowder, fireworks, nitroglycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha,

gasoline, benzine, benzole, or benzine varnish, or keep or use
12 camphene, spirit gas, or any burning fluid or chemical oils without written permission in this policy, then, and in every such case, this policy shall be void. Kerosene oil, however, may be used for lights in dwellings, stores, churches, and school-houses, and kept for sale in stores in quantities not exceeding five barrels, to be drawn by daylight only.

2. This insurance does not apply to or cover jewels, plate, watches, musical or scientific instruments (piano-fortes in dwellings excepted), ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture-frames, sculpture, casts, models, or curiosities, unless particularly specified in this policy. This corporation shall not be liable, by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid; nor for loss by theft at or after a fire; nor for money or bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind; nor for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power; nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire; nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist; nor for any loss caused by the explosion of gunpowder or any explosive substance; nor by lightning or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the casualty by explosion or lightning.

3. If a building shall fall, except as the result of a fire, all insurance by this corporation on it or its contents shall immediately cease and determine.

4. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the corporation and so expressed in the written part of this policy, otherwise the policy shall be void. When property has been sold or delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate. Goods held on storage must be separately and specifically insured.

5. In case the use or occupation of the above-mentioned premises, at any time during the period for which this policy would otherwise continue in force, shall be so changed as to increase the risk thereupon, except as may be hereafter agreed to by this corporation, in writing upon this policy, from thenceforth, so long as the same shall be used, this policy shall be of no force or effect.

6. The best endeavors of the assured shall be used in saving and protecting the property from damage at and after the fire; and in case of failure so to do, this corporation will not be liable for damage caused by such failure; and there can be no abandonment to the corporation of the property insured.

The use of general terms, or anything less than a distinct,
13 specific agreement, clearly expressed and endorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

7. In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this corporation no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon; and it is hereby declared and agreed that in the case of the assured holding any other policy in this or any other company on the property insured, subject to the conditions of average, this policy shall be subject to average in like manner. Any floating policy attaching, in whole or in part, to the property covered by this policy, shall, as between the insured and this corporation, be considered as contributing insurance for the full amount of such policy, and liable as such to pay *pro rata* any loss, total or partial, on the property insured.

Reinsurance, in case of loss, to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company.

8. This insurance may be terminated at any time at the request of the assured, in which case the corporation shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time, at the option of the corporation, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy.

9. Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the corporation, and, as soon thereafter as possible, render a particular account of such loss, signed and sworn to by them, stating whether any or what other insurance has been made on the same property, giving copies of the written portion of all policies thereon; also the actual cash value of the property and their interest therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss, when and how the fire originated, and shall also produce a certificate, under the hand and seal of a magistrate or notary public (nearest to the place of fire, not concerned in the loss as a creditor or otherwise, nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations under oath, by any person appointed by the corporation, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers, and exhibit the same for examination at the office of the corporation, and permit extracts and copies thereof to be made. The assured shall also produce certified copies of all bills and invoices, the originals of which have been lost, and shall ex-
14 hibit all that remains of the property which was covered by

this policy, damaged or not damaged, for examination to any person or persons named by the corporation.

When personal property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the corporation of the whole, naming the quantity, quality, and cost of each article. The amount of sound value and of damage shall then be ascertained by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise, nor related to the assured or sufferers), to be mutually appointed by the assured and the corporation, their report, in writing, to be made under oath before any magistrate or other properly commissioned person; one-half of the appraisers' fees to be paid by the assured. The corporation reserves the right to take the whole or any part of the articles at their appraised value; and until such proofs, declarations, and certificates are produced and examinations and appraisals permitted by the claimant, the loss shall not be payable.

In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, together with their respective interests therein. If this policy is made payable, in case of loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured. All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this corporation under this policy.

But provided, in case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award, in waiting, shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the corporation under this policy: And provided further, That it shall be optional with the corporation to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention so to do within thirty days after receipt of the proofs herein required; and in all cases, whether this corporation elect to build or not, the assured shall, if required, furnish plans and specifications of the buildings destroyed.

The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made, to ascertain the actual cash value.

Where property insured by this corporation is damaged by removal from a building in which it is exposed to loss by fire, said damages shall be borne by the insured and the insurers, in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

10. This insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided the premium therefor is paid and endorsed on this policy or a receipt given for the same, and it shall be considered as continued under the original representation, and for the original amounts and divisions, unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the corporation by the assured at the time of renewal, this policy and renewal shall be void:

11. It is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by this corporation, shall be deemed to be the agent of the assured named in this policy, and not of this corporation under any circumstances whatever, or in any transaction relating to this insurance.

12. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this corporation for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this corporation after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

Gas.—The generating or evaporating within the building, or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting, is prohibited under this policy, unless permitted in writing hereon.

Fences and other yard fixtures, also store furniture and fixtures, are not insured under the within policy, unless separately and specifically mentioned.

Plate-glass doors and windows, when the plates are of the dimensions of nine feet square or more, are not covered by insurance on the building, but must be separately and specifically insured.

Frescoed work, or gilding on walls or ceilings, is not covered by insurance on the building, but must be separately and specifically insured.

Builders' risk.—The working of carpenters, roofers, tinsmiths, gasfitters, plumbers, or other mechanics in building, altering, repairing the premises named in this policy will vitiate the same, unless permission for such work be endorsed in writing hereon, except in dwelling-houses only, where five days are allowed in any one year for incidental repairs, without notice or endorsement.

Goods in show-windows, where lights are used, must be separately insured, otherwise they are not protected by this policy.

And it is hereby understood and agreed by and between this corporation and the assured that this policy is made and accepted in reference to the foregoing terms and conditions, and to the classes of hazard and memoranda printed on the back of this policy, which is hereby declared to be a part of this contract, and to be used and resorted to in order to determine the rights and

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obligations of the parties hereto in all cases not herein or otherwise specially provided for in writing.

In witness whereof the corporation of the London Assurance have caused these presents to be signed by their secretary, in the city of New York.

Countersigned at Minneapolis this 10th day of March, A. D. 1883.

I. C. SEELEY, *Agent.*

B. LOCKWOOD, *Secretary.*

(Attached to the face of the above policy is the following:)

DRENNEN, STARR AND EVERETT.

$5,000. On their general stock of merchandise, consisting principally of crockery, china, glassware, silver and plated ware, cutlery, and such other merchandise usually kept for sale in a crockery store, all contained in the first and second stories and basement of Nos. 247 and 249, and in the third story of Nos. 245, 247, and 249 Hennepin avenue, of the three-story brick, gravel roof, store building, situated on block 53, Minneapolis, Minn. Permission given assured to keep for sale not to exceed 5 barrels of kerosene oil, which shall be of not less than the U. S. standard of 110 degrees; not to be handled or sold by artificial light within the distance of 15 feet, and to use electric lights in premises herein insured, the entire equipment being in full compliance with the standard of the New York Board of Underwriters, adopted January 12th, 1882.

It being understood that no alteration shall be made in the equipment without written consent from the agent of this company.

Other insurance permitted: This slip attached and made a part of policy No. 670,008—873 of the London Assurance Corporation of London, Eng.

I. C. SEELEY, *Agent.*

MAY 5, '83.

From and after this date the form of this policy is amended to read as follows: And in consideration of an increase of hazard, $8.25 add. prem. is charged the assurred.

I. C. SEELEY, *Ag't.*

STATE OF MINNESOTA, } ss:
County of Hennipen, }

Edward D. Everett came before me personally, and, being duly sworn, doth say that he is a member of the firm of Drennen, Starr & Everett, and one of the plaintiffs in the above-entitled action; that the foregoing complaint is true, of his own knowledge, except as to the matters herein stated on his own information and belief, and as to those matters he believes it to be true.

EDWARD D. EVERETT.

17 Subscribed and sworn to before me on this 8th day of Jan'y, A. D. 1884.

[SEAL.] R. P. J. DRENNEN,
Notary Public, Minn.

(Endorsed:) Filed Feb'y 20th, 1884. E. J. Davenport, clerk.

Reply.

District Court.

STATE OF MINNESOTA, } ss:
Hennepin County, }

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. Everett, Partners in Business Under the Firm Name and Style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION.

The plaintiffs above named, replying unto the answer of the above-named defendant herein—

First. Deny that on or about the twenty-fourth day of May, A. D. 1883, or ever, said plaintiffs became copartners with David M. Arndt mentioned in said answer, under the firm name of Drennen, Starr, and Everett, or under any other firm name or at all, and deny that said plaintiffs have ever been copartners with said David M. Arndt, and deny that said David M. Arndt is a necessary party to this action.

Second. Replying unto each and every of the allegations in the said answer contained in the last three lines of folio two and in folio three thereof, plaintiffs allege that the sum insured upon said property in and by said policies was not less that $6,000, except that in the event of the whole damage suffered by plaintiffs by the destruction thereof and injury thereto by fire should be less than the whole amount of the insurance which plaintiffs had thereon at the time of any such destruction and damage, and plaintiffs allege that the amount of damage suffered by them upon said property in the destruction thereof and injury thereto by the fire mentioned in the complaint herein, was not less but greatly in excess of the whole amount of insurance which they then had upon said property.

Third. Deny that on May 24th, A. D. 1883, or ever, the said insurance terminated or said policies became void by the admission of said David M. Arndt as a copartner of plaintiffs, or for any other cause, and deny that they thereby or in any manner sold, transferred, or assigned to said David M. Arndt a joint or any interest with them as a copartner in the said insured property or otherwise, and deny that said David M. Arndt was admitted into copartnership by plaintiffs, or that he took possession of said property jointly with plaintiffs, or otherwise, and deny that the title, interest, or possession of plaintiffs was changed by their voluntary act or otherwise.

18 Fourth. Deny that in their proofs of loss, or in their complaint herein, or at any time or times, or in any manner, said assured, the plaintiffs herein, have ever falsely sworn or falsely represented to the defendant that the value of the property destroyed or the amount of their loss was the sum of $117,715.45, but that they have sworn, stated and alleged that the value of such property destroyed and the amount of their loss was $117,715.45, and allege that the same was and is in all respects true, and that the value of their stock at and before said fire was fully the last-mentioned sum, and more, to wit, the sum alleged in the complaint herein.

Fifth. Deny that plaintiffs or either of them have ever at any time made any false oaths, representations, concerning their said stock, or the value thereof, or their said loss, or that they or either of them ever had any intent or purpose of obtaining payment from defendant for more than its just proportion of said loss, or that said policies became void, or the claims of plaintiffs against defendant barred for any cause.

Wherefore plaintiffs pray judgment, as in their complaint herein they have prayed.

L. J. C. DRENNEN,
Attorney for Plaintiffs, Minneapolis, Minnesota.
SHAW AND CRAY,
Of Counsel for Plaintiffs, Minneapolis, Minn.

STATE OF MINNESOTA, }
County of Hennepin, } *ss:*

Frederick W. Starr — came before me personally, being duly sworn, says: That he is one of the plaintiffs in the foregoing entitled action, and that the foregoing reply is true, of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

FRED. W. STARR.

Subscribed and sworn to before me, this 11th day of February, A. D. 1884.

[SEAL.] JOHN HAY,
Notary Public, Hennepin Co., Minn.

(Endorsed:) Filed Feb. 20, 1884. E. J. Davenport, clerk.

19 *Petition for Removal.*

STATE OF MINNESSOTA:

In District Court, Hennepin County.

EUGENE J. A. DRENNEN, FREDERICK W STARR, and EDWARD D. Everett, Partners in Business under the Firm Name and Style of Drennen, Starr & Everitt, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION, Defendant.

To the honorable the judges of the district court of Hennepin county:

Now comes your petitioner, The London Assurance Corporation, by Cameron, Losey and Bunn and C. K. Davis, its attorneys, and respectfully represents that the plaintiffs, Eugene J. A. Drennan, Frederick W. Starr, and Edward D. Everett, are, and were at the time this action was commenced, citizens of the State of Minnesota, and that this defendant is, and was at the time this action was commenced, a corporation duly incorporated, and by the laws of Great Britain a subject of said kingdom and an alien.

That this suit is of a civil nature at law, and the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the controversy is between citizens of the State of Minnesota and a citizen and subject of Great Britain and an alien.

Your petitioner makes and files in this court a bond, with good and sufficient surety for its entering in the circuit court of the United States for the district of Minnesota, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for the appearing and entering of special bail in said suit if special bail was originally requisite therein. This application is made at the term at which this cause could be first tried, and before the trial thereof.

Your petitioner therefore prays the court to accept said petition and bond and proceed no further in said suit, and order the said cause to be transferred to the said circuit court of the United States for the district of Minnesota.

CAMERON, LOSEY & BUNN AND
C. K. DAVIS,
Atty's for Defendant.

(Endorsed:) Filed March 17, 1884. E. J. Davenport, clerk, by C. B. Tirrell, deputy.

Bond on Removal.

Know all men by these presents that we, The London Assurance Corporation of London, England, and I. C. Seeley, surety, are held and firmly bound unto Eugene J. A. Drennen, Frederick W. Starr,

and Edward D. Everett, of Minneapolis, Minnesota, in the
20 penal sum of five hundred dollars, the payment whereof well and truly to be made unto the said Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, their heirs and assigns, we bind ourselves, our heirs and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions the said London Assurance Corporation having petitioned the district court of Hennepin county, State of Minnesota, for the removal of a certain cause therein pending, wherein Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett are plaintiffs, and The London Assurance Corporation is defendant, to the circuit court of the United States in and for the district of Minnesota: Now, if the said London Assurance Corporation, your petitioner, shall enter into the said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in said circuit court in said suit, if special bail was originally required therein, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 26th day of February, 1884.

LONDON ASSURANCE CORPORATION,
By GEO. C. CLARK, *Gen'l Agent.* [SEAL.]
I. C. SEELEY. [SEAL.]

STATE OF MINNESOTA, *County of Hennepin*:

I, I. C. Seeley, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say: That I am a resident of the State of Minnesota, and a property holder therein; that I am worth the sum of one thousand dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in the State of Minnesota liable to execution of the value of more than one thousand dollars.

I. C. SEELEY. [L. S.]

Subscribed in my presence by I. C. Seeley, and by him sworn to before me, this 29th day of February, 1884.

[SEAL.] J. A. WALTERS,
Notary Public of Hennepin Co., State of Minnesota.

Order for Removal.

STATE OF MINNESOTA, *County of Hennepin:*

District Court, Fourth Judicial District.

EUGENE J. A. DRENNAN, FREDERICK W. STARR, and EDWARD D. Everett, Partners in Business under the Firm Name and Style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION, Defendant,

On the reading and filing the petition and bond of the
21 above-named defendant, and the said bond having been duly approved and accepted, it is ordered that this cause be, and the same is hereby, transferred and removed to the circuit court of the United States for the district of Minnesota, as in said petition prayed.

Dated this 11th day of March, 1884.

By the court:

WILLIAM LOCHREN, *Judge.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

C. K. Davis, having been duly sworn, deposes that on the 12th day of March, A. D. 1884, he served the within order for removal upon L. J. C. Drenner, the plaintiffs' attorney, by enclosing a true copy of such order in an envelope, sealing the same and paying postage thereon, addressing the same to the said Drenner at Minneapolis, Minnesota, the place of his office and residence, and depositing the same in the post office at St. Paul, Minnesota, the place of deponent's office and residence, and between such places there is regular communication by mail.

C. K. DAVIS.

Subscribed and sworn to before me this 12th day of March, 1884.

[SEAL.] W. C. HUBBELL,
Notary Public, Ramsey Co., Minn.

(Endorsed:) Filed Mar 24, 1884. E. J. Davenport, clerk.

STATE OF MINNESOTA, *County of Hennepin:*

I, E. J. Davenport, clerk of the district court of the 4th judicial district, county of Hennepin, State of Minnesota, do hereby certify and return to the honorable circuit court of the United States that the annexed are true and correct copies of the summons, complaint, reply, petition, bond, and order for removal of cause to United States circuit court; that I have compared the same with the originals remaining of record in my office, and find the same to be true and correct copies and transcripts thereof, and of the whole of said record.

Witness my hand and seal of said court at the city of Minneapolis, Minnesota, this 29th day of May, A. D. 1884.

[SEAL.] E. J. DAVENPORT, *Clerk*,
By H. J. ALLNOW, *Deputy*.

(Endorsed:) U. S. circuit court, district of Minn. Return from State court. Filed March 31, 1884. Oscar B. Hillis, clerk.

And afterwards, to wit, on said 31st day of May, 1884, defendant filed its answer in this cause in words and figures as follows, viz:

22 *Answer.*

STATE OF MINNESOTA:

In District Court for Hennepin County.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. Everett, Partners in Business under the Firm Name and Style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION.

The answer of the London Assurance Corporation, by Cameron, Losey and Bunn and C. K. Davis, its attorneys, denies that the plaintiffs were, at the time of the fire named in the complaint, or were at the commencement of this action, or at any time subsequent to the 24th day of May, 1883, copartners as alleged in the complaint, and, on the contrary, this defendant alleges that on or about said 24th day of May, A. D. 1883, the plaintiffs became copartners with one David M. Arndt, under the firm name of Drennen, Starr and Everett, in the property insured, and that they and said David M. Arndt have ever since continued to be such copartners, and said David M. Arndt is a necessary party to this action.

The defendant denies that by the terms of said policies it insured the plaintiffs against loss in the sum of $6,000 *dollars*, as alleged in the complaint, and alleges that by the terms of said policy it insured the said property for such a proportion of the whole loss sustained, not exceeding $6,000 *dollars*, as the sum named in said policies should bear to the whole sum insured thereon, whether such other insurance was made prior or subsequent to such policies of the defendant, and whether the same was valid or not; and the defendant alleges that at the time of the fire the whole amount insured on said property named in the complaint was 97,000 dollars.

Further answering, the defendant alleges that it was expressly agreed in said policies that if said property should be sold or transferred, or if any change should take place in the title or possession (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree, or voluntary transfer or conveyance, then the policies should be void; also that when the property should be so sold or incumbered, or otherwise disposed of, so that the interest or liability on the part of the assured named in

the policies should cease or be changed, the insurance provided by said policies should immediately terminate. That on May 24th, A. D. 1883, the said insurance terminated, and the policies became void by the admission of said David M. Arndt as a copartner, as before stated. That thereby the said plaintiffs sold, transferred, and assigned to said David M. Arndt a joint interest with them as copartner in the insured property, and the said David M. Arndt was admitted into copartnership by the plaintiffs and took possession of said property jointly with the plaintiffs, and thereby the plaintiffs' title, interest, and possession was changed by their voluntary act, without the knowledge or consent of this defendant.

23 Further answering, the defendant alleges that by and in said policies of insurance it was expressly contracted and agreed that all fraud or attempt at fraud by false swearing or otherwise should forfeit all claim upon the defendant, and should be a complete bar to any recovery for loss under the said policies. That in the proofs of loss made by the assured, and in their sworn complaint, and at sundry and divers times since the said fire, the assured have falsely sworn and represented to the defendant that the value of the property destroyed and the amount of their loss was the sum of 117,715.45 dollars.

The defendant denies that the value of property destroyed or the amount of loss was $117,715.45, as alleged, or that the value of said property or the amount of loss was any greater sum than $80,699.84, which facts the plaintiffs at all times well knew; and they aver that the value of the stock at and before the time of the fire did not exceed 86,162.74 dollars, and that it was much less than that sum.

The defendant alleges that said false oaths and representations were made and presented to the defendant, the plaintiffs well knowing them to be false, with the fraudulent intent and purpose on the part of the plaintiffs of obtaining payment of the defendant for more than its just proportion of said loss, and thereby the plaintiffs' policy became void, and any claim they may have had against the defendant became barred.

Wherefore the defendant demands judgment dismissing plaintiffs' case, with costs.

CAMERON, LOSEY & BUNN AND
C. K. DAVIS, *Defendant's Attorneys.*

STATE OF WISCONSIN, }
County of La Crosse, } ss:

Charles W. Bunn, being duly sworn, says he is one of the defendant's attorneys in this action, and knows the contents of the foregoing answer; that the same is true to the best of his knowledge, information, and belief; that the reason why this affidavit is made by defendant is that the defendant is a foreign corporation not present, and having no officers in the county of Ramsey, Minnesota, or La Crosse county, Wisconsin, where the attorneys of the defendant reside, and therefore deponent makes this affidavit on its behalf.

CHARLES W. BUNN.

Subscribed and sworn to before me this 8th day of February, 1884.

[SEAL.] THOMAS A. DYSON,
Notary Public, La Crosse Co., Wis.

STATE OF WISCONSIN, *County of La Crosse:*

OFFICE OF CLERK OF CIRCUIT COURT.

I, Charles Smith, clerk of the circuit court of the county of La
24 Crosse, in the State of Wisconsin, the said court being a court of record and having a seal, do hereby certify that Thomas A. Dyson, Esquire, whose name appears subscribed to the annexed instrument, was, at the date thereof, a notary public within and for said State, residing in said county, duly appointed and qualified, and empowered by the laws of said State to administer oaths, take acknowledgments of deeds, and perform such other duties as by the law of nations or according to commercial usage may be performed by notaries public, and that to his acts and attestations as such full faith and credit are and ought to be given in court and out. I further certify that I verily believe said signature purporting to be his is genuine; that the seal thereto attached is a correct impression of his official seal, and that said instrument is executed and acknowledged according to the laws of said State.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at the court-house, in the city of La Crosse, in said county and State, on this 8th day of February, A. D. 1884.

[SEAL.] CHARLES SMITH,
Clerk of Circuit Court, as aforesaid.

(Endorsed:) Service of within answer by copy admitted this 9th day of Feb'y, 1884. L. J. C. Drennen, att'y for pl'ffs, per Shaw & Cray, of counsel. Filed May 31, 1884. Oscar B. Hillis, clerk.

And afterwards, to wit, on the first day of July, A. D. 1884, the following proceedings were had in said cause, viz:

Term Minutes, June Term, 1884. *July 1st,* 1884.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. Everett, Partners in Business Under the Firm Name and Style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION.

Before Justice Samuel F. Miller.

This cause being regularly called for trial, the plaintiffs appeared, by L. J. C. Drennen and J. M. Shaw, their attorneys, and the defendant, by Cameron, Losey & Bunn, and C. K. Davis, its attorneys; thereupon it is ordered that a jury come, to wit: R. A. Lanpher, Edward Dunn, Charles J. Yeager, J. A. Spencer, T. C. Arnold, John Beyer, Noah Sinks; and it appearing to the court that the panel of

of regular jurors is exhausted, it is ordered that the marshal call in by-standers to fill up the *the* jury; thereupon come A. Larsen, P. V. Brown, L. A. Robert, Lorenzo Hoyt, and T. J. Kennedy, twelve good and lawful men, who are duly sworn to try the issues joined herein.

Thereupon J. M. Shaw opens the case for plaintiffs.

C. K. Davis opens for defendant.

25 P. M. Endesley sworn & examined on behalf of def't.
O. O'Brien " " " " "
Lewis Jott " " " " "
E. E. Houghson " " " " "
And here the defendant rests.

Eugene J. A. Drennen sworn and examined on behalf of plaintiffs.
And here the plaintiffs rest.

And the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be postponed until to-morrow morning at 10 o'clock.

And afterwards, to wit, on July 2nd, 1884, the following further proceedings were had in said cause, viz:

Term Minutes, June Term, A. D. 1884. *July 2nd,* 1584.

United States Circuit Court, District of Minnesota.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D Everett, Partners in Business Under the Firm Name and Style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION.

Before Justice Samuel F. Miller and Judge R. R. Nelson.

This day again come the parties, by their respective attorneys, and the jury sworn to try this cause; thereupon the court instructs the jury and they retire to consider of their verdict. After due consultation, and being fully advised concerning the same, they return into court, by their foreman, the following verdict, to wit:

"We, the jury in the above-entitled action, do find for the defendant.

"LORENZO HOYT, *Foreman.*"

It is therefore considered, ordered, and adjudged by the court that the defendant go hence without day, and that it recover of and from the plaintiffs, or either of them, its costs and disbursements herein, to be taxed, and that it have execution therefor.

And afterwards, to wit, on said 2nd day of July, 1884, the following stipulation of the parties herein was filed in said cause in the clerk's office of our said court, to wit:

In the Circuit Court of the U. S., District of Minnesota.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. Everett, Partners in Business Under the Firm Name and Style of Drennen, Starr and Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION.

The above-named plaintiffs hereby agree to take a writ of error
26 from the judgment in the above-entitled action to the Supreme Court of the United States, and to file the same and a transcript of the record in the office of the clerk of said Court on or before the second Monday in October, 1884, and it is agreed and stipulated furthermore between the parties to this action that they will submit the said case to said Supreme Court on both sides by printed briefs, to be filed in said Supreme [Court] on or before the first Monday in November, 1884.

L. J. C. DRENNEN, *Plaintiff's Attorney.*
CAMERON, LOSEY AND BROWN AND
C. K. DAVIS,
Defendant's Attorneys.

(Endorsed:) Filed July 2nd, 1884. Oscar B. Hillis, clerk.

And afterwards, to wit, on the 5th day of July, 1884, the following bill of exceptions were duly signed by the circuit justice, Hon. Samuel F. Miller, and ordered filed in said cause, viz:

In Circuit Court U. S., Dist. of Minnesota.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. Everett, Partners in Business Under the Firm Name and Style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION.

The above-entitled cause came on for hearing in the above-named court at the June general term for the year 1884 thereof, to wit, on the 30th day of June, A. D. 1884, before the Honorable Samuel F. Miller, judge, and a jury, upon the issues joined upon, and by the pleadings, to wit, the complaint, answer, and reply.

The case was opened to the jury by J. M. Shaw, Esq., of counsel for the plaintiffs.

Thereupon it was stipulated and agreed in open court by the counsel for defendant, to wit, C. K. Davis, Esq., and Messrs. Cameron, Losey and Dunn, that the defendant would withdraw and abandon the defence set up in its answer of alleged fraudulent overvaluation of the property insured and destroyed, and would rely upon the alleged defence of the avoidance of the policies by change of interest and title or possession in and to the insured property after the delivery of said policies alone; and it was further admitted by defendant that the contracts and policies of insurance had been made and delivered, and that at the time of such making and delivery the plaintiffs were the sole owners of the property thereby insured, and

that the fire had occurred, and that thereby of the goods and property described in said policies there had been destroyed the amount and value as alleged in the complaint, and that the plaintiffs had given due notice and furnished to defendant due and formal
27 proofs of said alleged loss; also that there were other policies of insurance upon the same property held by plaintiffs at the time of said fire and destruction, amounting to ninety-one thousand dollars, as alleged in the complaint and answer.

The plaintiff thereupon rested.

The case was thereupon opened to the jury on behalf of defendant by C. K. Davis, Esq., of counsel for defendant.

The defendant, to sustain the said issue and defence upon its part, thereupon offered in evidence the said two policies of insurance, a true copy of each of which is annexed to the complaint herein, which were received.

It was testified by Allie O'Brien, a witness for defendant, and the book-keeper of plaintiffs, that on the 18th day of June, A. D. 1883, said plaintiffs received from David M. Arndt, mentioned in the pleadings, the sum of five thousand dollars in money, which said sum was thereupon placed to the credit of said David M. Arndt's individual name upon the account books of said plaintiffs, and was by plaintiffs deposited in their bank. That on the third day of July, A. D. 1883, said Arndt made and delivered to plaintiffs his promissory note for five thousand dollars, payable eighteen months after date, which was also entered upon the account books of plaintiffs to the credit of said David M. Arndt's individual name, and was received by plaintiffs as other bills receivable received by plaintiffs in their business.

It was further testified by E. J. A. Drennen, one of the plaintiffs, and admitted, that said David M. Arndt came from his home in Sandusky, Ohio, to Minneapolis, Minnesota, the place of business of said plaintiffs, and was first introduced to and became known to the plaintiffs, E. J. A. Drennen and Frederick W. Starr, on or about the 20th day of May, A. D. 1883. That thereupon negotiations were entered into between said Drennen and Starr, acting for the plaintiffs, and said Arndt concerning the forming of business relations, which negotiations resulted on the 24th day of said May in the making and signing of a written agreement, in words and figures as follows, to wit:

This agreement made and entered into this 24th day of May, A. D. 1883, by and between E. J. A. Drennen, F. W. Starr, and Edward D. Everett, who are now members of and constitute the firm of Drennen, Starr and Everett, all of the city of Minneapolis, Minnesota, parties of the first part, and D. M. Arndt, of the city of Sandusky, Ohio, party of the second part, witnesseth: Said parties of the first part hereby agree to receive into their business said Arndt on the following terms and conditions:

1st. Said company is to become incorporated.

2nd. Said Arndt is to pay into said firm for its use on or before June 14th, 1883, five thousand dollars.

3rd. Said Arndt is to pay into said firm, for its use, on or before January 1st, 1885, an additional sum of five thousand dollars.

4th Said Arndt is to pay said firm interest at the rate of 8 per cent. per annum on each of said sums of five thousand dollars from January 1st, 1883, till each of said sums shall be paid as aforesaid, the interest on last-mentioned sum to be paid semi-annually.

5th. If said Arndt shall be unable to pay said second $5,000 by January 1st, 1885, his interest shall be decreased 50 per cent., and until said last-mentioned sum of $5,000 shall be paid, or interest decreased as aforesaid, the liability of said Arndt therefor shall be evidenced by his promissory note executed to said firm, bearing interest as aforesaid, and dated January 1st, 1883. The business to be carried on by the new company to be formed as aforesaid shall be of the same nature as that now conducted by Drennen, Starr, and Everett; the name of the new company to be formed shall be determined hereafter.

It is understood and agreed that of the effects and rights of the firm of Drennen, Starr and Everett, said Drennen owns one-half and said Starr and Everett each one-fourth thereof. All said rights and effects shall be put into the corporation to be formed as aforesaid, at their value as shown by the inventory taken January 1st, 1883, less any loss by reason of non-payment of any claim for goods sold by them before that time, and that to the amount to be contributed as aforesaid shall be added said sum of ten thousand dollars to be paid by said Arndt as aforesaid.

The interest and shares of the several parties to this agreement in the new company shall be in proportion to the amount contributed by each to its capital stock, according to the plan aforesaid.

When a charter shall be procured as aforesaid, 50 per cent. of the stock of said Arndt shall be held by said company, or some one in trust for it, till said second sum of $5,000, with accruing interest thereon, shall be paid. It is understood that Arndt is to attend to the book-keeping and office work of said business, and that each remaining partner of the firm of Drennen, Starr and Everett shall actively engage in the business of the new company; that no change in the name or character of the firm of Drennen, Starr and Everett shall be made until said corporation shall be formed.

In testimony whereof said parties hereto set their signatures, the day and year first herein written.

E. J. A. DRENNEN.
FRED. W. STARR.
DAVID M. ARNDT.

That said Edward D. Everett, one of said plaintiffs, was, at and during the time of the said negotiations, and the making and signing of said contract, absent from said Minneapolis, but returned soon afterwards, and was made acquainted by his partners with the making and contents of said written agreement; that this was the final agreement between said plaintiffs and said Arndt; that immediately after the making and signing of said written agreement said Arndt went

to said Sandusky, Ohio, and returned therefrom again to said Minneapolis about the 17th day of June, 1883, after the said return of said Everett, and after the said Everett had received the aforesaid
29 information, and thereafter delivered the money and note received by plaintiffs, as testified by the witness O'Brien; that said money and note were so delivered by said Arndt and received by said plaintiffs under and pursuant to and by virtue of the conditions of said agreement, and not otherwise.

Upon the foregoing admissions and testimony, which was all that was received or considered on said trial, the plaintiffs prayed the court to charge the jury that the making of said written agreement between said plaintiffs and the said D. M. Arndt, and the subsequent reception of said money and note by plaintiffs thereunder, and entry upon the books as testified, would not and did not constitute said David M. Arndt a partner with said plaintiffs, as between themselves, and did not have the effect to assign or transfer to said Arndt any title or interest in the goods and property insured in and by said policies of insurance.

The court refused so to charge, but charged the jury that said agreement so signed, if assented to by said Everett, and the receipt by said plaintiffs of said money and note and the credit thereof by them in their books to said Arndt, would and did constitute said Arndt a partner with said plaintiffs, as between themselves, from the time of the receipt by plaintiffs of said money, and had the effect then to convey and transfer to and vest in said Arndt a joint and undivided interest and title with said plaintiffs in said insured property.

To which refusal to charge as requested said plaintiffs then and there duly excepted, and said exception was duly noted and allowed, and to said charge of said court as given, and to each and every part thereof, said plaintiffs then and there duly excepted, and said exception was duly noted and allowed.

The plaintiffs further prayed the court to charge the jury that if, after the making of said policies and before said loss, there had been a copartnership relation created between said plaintiffs and said Arndt, whereby there had been transferred and conveyed to said Arndt a joint and undivided interest and title with said plaintiffs in the said insured property, such fact would not have the effect to wholly avoid said policies of insurance, but that said plaintiffs might still recover at least a proportionate amount upon the policies sued upon to the extent of their remaining title and interest in said insured property. The court refused so to charge, but charged the jury that, under the conditions of said policies, any change in the title or possession of the insured property by voluntary assignment or transfer after the delivery of said policies without the assent of defendant would operate as an entire avoidance of said policies, and that if the plaintiffs had received said Arndt into their firm as a partner, so as to transfer and assign to and vest in him a joint and undivided interest and title with them in the insured property, that was such a change of interest and title as was within the conditions of said policies, and would operate as an entire avoidance of them,

and would be a bar to any recovery by plaintiffs; and that if such was the fact their verdict must be for the defendant.

To which refusal to charge as requested said plaintiffs then and there duly excepted, and said exception was duly noted and allowed, and to the said charge, as given by the court, and to each and every part thereof, the plaintiffs then and there duly excepted, and said exception was duly noted and allowed.

The jury thereupon, on the 2nd day of July, A. D. 1884, rendered a verdict in said cause for defendant. Whereupon the plaintiffs prayed for a bill of exceptions.

And whereas none of the aforesaid matters are of record, the above bill of exceptions is duly allowed, signed, and sealed during the term, this fifth day of July, A. D. 1884.

SAM. F. MILLER, *Judge*. [SEAL.]

(Endorsed:) Filed July 5th, 1884. Oscar B. Hillis, clerk.

And afterwards, to wit, on the 12th day of July, A. D. 1884, the following proceedings in said cause *was* had, viz:

Term Minutes, June Term, A. D. 1884. *July 12th*, 1884.

United States Circuit Court for the District of Minnesota.

Present: Hon. R. R. Nelson, judge.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. Everett, Partners in Business Under the Firm Name and Style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION.

The above-named plaintiffs, by their attorneys, having heretofore presented to the court a bill of exceptions excepting to the ruling of the court upon the testimony adduced and its charge to the jury in this cause, and said bill of exceptions having been signed by the court, and ordered filed and made a part of the record herein, which was accordingly done: Now this day come the plaintiffs herein, by their attorneys, and present an appeal bond praying an appeal to the United States Supreme Court. Whereupon said bond is approved by the Hon. R. R. Nelson, judge, and it is by the court ordered that an appeal of this cause be, and the same is hereby, allowed, and that a writ of error issue herein pursuant to law. Thereupon a citation is signed and issued herein.

And on said 12th day of July, an appeal bond was filed and approved in said cause, said bond being in words and figures as follows, to wit:

Supreme Court of the United States.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. Everett, Partners in Business Under the Firm Name and Style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION, Defendant.

31 KNOW all men by these presents that we, Eugene J. A. Drennen, of Minneapolis, Minnesota, as principal, and Elijah A. Harmon and General A. B. Nettleton, of same place, as sureties, are held and firmly bound unto the London Assurance Corporation in the sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made to said The London Assurance Corporation, its successor or assigns, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 11th day of July, A. D. 1884.

Whereas the above-named plaintiffs, Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, have presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Minnesota:

Now, therefore, the condition of this obligation is such that if the above-named Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett shall prosecute their said writ of error to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise, in full force and virtue.

E. J. A. DRENNEN. [SEAL.]
ELIJAH A. HARMON. "
A. B. NETTLETON "

Signed, sealed, and delivered in presence of—
R. P. J. DRENNEN.
L. J. P. DRENNEN.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Be it known that on this 11th day of July, A. D. 1884, personally appeared before me Eugene J. A. Drennen, Elijah A. Harmon, and A. B. Nettleton, to me personally known to be the same persons who executed the foregoing bond, and they each acknowledged they executed the same freely and voluntarily for the uses and purposes therein expressed.

[SEAL.] R. P. J. DRENNEN,
Notary Public, Hennepin County, Minnesota.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Elijah A. Harmon and A. B. Nettleton, being duly sworn, each for himself on his oath says that he is a resident and freeholder of the

State of Minnesota, and is worth the sum of one thousand dollars over and above all his debts and liabilities and exclusive of his property exempt from execution, and that he is a surety in the foregoing bond.

ELIJAH A. HARMON.
A. B. NETTLETON.

Subscribed and sworn to before me this 11th day of July, A. D. 1884.
[SEAL.] R. P. J. DRENNEN,
Notary Public, Hennepin County, Minn.

(Endorsed:) The within bond and sureties therein are hereby approved. R. R. Nelson, judge dist. court, U. S. dist. Minn. Filed July 12th, 1884. Oscar B. Hillis, clerk.

32 And on the 11th day of September, A. D. 1885, the following proceedings on a second trial of this cause were had, said proceedings being in the words and figures following:

Term Minutes, June Term, A. D. 1885. *September* 11*th*, 1885.

United States Circuit Court for the District of Minnesota.

EUGENE J. A. DRENNEN *et al.*

vs.

LONDON ASSURANCE CORPORATION.

This cause being regularly called for trial the plaintiffs appeared, by J. M. Shaw, Esq., and L. J. C. Drennen, Esq., their attorneys, and the defendant, by C. K. Davis, Esq., and Mr. Bunn, its attorneys. Thereupon it is ordered that a jury come, to wit: Frank Keller, Aaron Gould, James Shonts, Henry Kreis, George W. Robards, H. H. Luers, Francis Iberson, L. T. Drebert, L. A. Hancock, F. W. Phelps, Martin Henry, and Edward Miller, twelve good and lawful men, who are duly sworn to try the issues joined herein.

Thereupon the trial of said cause is proceeded with as follows, to wit:

J. M. Shaw, Esq., opens the case for the plaintiffs.

Documentary testimony offered in evidence on behalf of plaintiffs.

And here the plaintiffs rest.

C. K. Davis, Esq., opens the case for the defendant.

Testimony of Alice O'Brien on the former trial read in evidence on behalf of defendant.

P. M. Endsley, Lewis Iott, E. E. Hughson, respectively, sworn and examined on behalf of defendant.

And here the defendant rests.

E. J. Drennen, sworn and examined on behalf of plaintiffs in rebuttal.

33 F. W. Starr, sworn and examined on behalf of plaintiffs in rebuttal.

And the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until to-morrow morning at 10 o'clock.

34 *Proceedings on Second Trial.*

United States Circuit Court, District of Minnesota. Term Minutes, June Term, A. D. 1885.

EUGENE J. A. DRENNEN *et al.*

vs.

THE LONDON ASSURANCE CORPORATION.

SEPTEMBER 12, 1885.

This day come the parties, by their respective attorneys, and the jury — sworn to try this cause, thereupon further proceedings are had as follows, to wit:

Edward D. Everett, sworn and examined on behalf of plaintiffs in rebuttal; Eugene J. A. Drennen, same; C. K. Davis, Esq., sums up for the defendant; L. J. C. Drennen sums up for the plaintiffs.

Thereupon the court instructs the jury, and they retire to consider of their verdict.

Pursuant to agreement of the attorneys for the respective parties it is ordered that, if the jury agree before Monday morning, they appoint a foreman and seal their verdict and return it into court by said foreman on Monday morning at 10 o'clock.

35 *Proceedings on Second Trial.*

Verdict and Judgment.

United States Circuit Court for the District of Minnesota. Term Minutes, June Term, A. D. 1885.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. Everett, Partners in Business under the Firm Name and Style of Drennen, Starr & Everett,

vs.

THE LONDON ASSURANCE CORPORATION.

SEPTEMBER 14TH, 1885.

The jury in this cause having been heretofore instructed by the court and retired to consider of their verdict, and after due consultation and being fully advised in the premises, returned into court, by their foreman, their sealed verdict as follows, to wit:

"Drennen *et al. vs.* The London Assurance Corporation. We, the jury, find for the plaintiffs, and assess the damages at six thousand seven hundred and seventy (6,770) dollars. F. T. Drebert, foreman.'

It is, therefore, considered, ordered, and adjudged by the court that the above-named plaintiffs do have and recover of and from the above-named defendant the sum of six thousand seven hundred and seventy dollars (6,770) *dollars* so found to be due by the jury, besides

their costs and disbursements herein to be taxed, and that they have execution therefor. Thereupon, upon motion of C. K. Davis, Esq., defendant's attorney, it is ordered that execution be stayed for a period of forty-two days. Defendant also notices an appeal to the Supreme Court of the United States.

36 Circuit Court of the United States, District of Minnesota.

EUGENE J. A. DRENNAN, FREDERICK W. STARR, and EDWARD D. EVERETT, Plaintiffs,

vs.

LONDON ASSURANCE CORPORATION, Defendant.

The above-entitled cause came on for hearing in the above-named court at the June general term, for the year 1885, thereof, to wit, on the 11th day of September, 1885, before the Honorable R. R. Nelson, district judge, sitting as circuit judge, and a jury upon the issues joined upon and by the pleadings, to wit, the complaint, answer, and reply.

The case was opened to the jury by J. M. Shaw, Esq., of counsel for the plaintiffs. Thereupon it was stipulated and agreed in open court by counsel for the respective parties that the defendant withdraw and waive the defence set up in its answer of fraudulent overvaluation of property destroyed by the fire mentioned in the pleadings herein, and will and does hereby admit that the goods and property mentioned in the complaint herein were destroyed and damaged by said fire, as therein alleged, to the amount and value of $117,715.45.

37 "That the defendant would withdraw and abandon the defence set up in its answer of alleged fraudulent overvaluation of the property insured and destroyed, and would rely upon the alleged defence of the avoidance of the policies by change of interest and title of possession in and to the insured property after the delivery of said policies alone; and it was further admitted by defendant that the contract and policies of insurance had been made and delivered, and that at the time of such making and delivery the plaintiffs were the sole owners of the property thereby insured; and that the fire had occurred, and that thereby of the goods and property described in said policies there had been destroyed the amount and value as alleged in the complaint; and that the plaintiffs had given due notice and furnished to the defendant due and formal proofs of said alleged loss; also that there were other policies of insurance upon the same property held by plaintiffs at the time of said fire and destruction, amounting to ninety-one thousand dollars, as alleged in the complaint and answer."

The plaintiffs thereupon offered in evidence the said two policies of insurance, a true copy of each of which is annexed to the complaint herein, which were received.

The plaintiff thereupon rested. The case was then opened to the jury by C. K. Davis, Esq., of counsel for the defendant.

The defendant, to sustain the issues on its part, offered as a witness Miss Allie O'Brien, the book-keeper of the defendant, who testified

that on the 18th day of June, 1883, the plaintiffs received from one D. M. Arndt the sum of five thousand dollars in money, which they thereupon placed to the credit of said David M. Arndt's individual name upon the account books of said plaintiffs, and was deposited in the bank to the credit of the plaintiffs; that on the 3d day of July, 1883, said Arndt made and delivered to plaintiffs his promissory note for five thousand dollars, payable eighteen months
38 after date, which was also entered in the account books of the plaintiffs to the credit of said David M. Arndt's individual name, and was received by plaintiffs as other bills receivable received by plaintiffs in their business.

The defendant next offered P. M. Endsley, a notary public, who testified that he took the examination of each one of the plaintiffs in relation to their claim for the insurance by question and answer under the clauses of the policies relative to proofs of loss. He identified three papers shown him as those examinations so taken down by him. His own signature and seal as notary public were attached to each examination, and the signature of each plaintiff was attached to the examination of such plaintiff; that the several plaintiffs either signed the examinations before him or took them away to examine, and brought them back signed, and each swore to the examination subscribed by him before the witness; that any alterations were made by the several parties, and made before the examinations were sworn to.

The defendant then read from the said examination of the plaintiff, F. W. Starr, subscribed by him as follows:

"Personally appeared F. W. Starr, who, having been duly sworn, deposes and says he is a member of the firm of Drennen, Starr & Everett; that he will true answers make to any and all interrogatories propounded by J. Mabbit Brown in reference to their business and stock of goods, and any other questions considered pertinent, to sign the same when reduced to writing, which he hereby agrees shall be and become a part and parcel of any and all papers presented to the different insurance companies in proof of the loss by fire July 29th, 1883.

* * * * * * *

"Q. Since the first of January, 1883, you have admitted a
39 new partner, have you not?

A. We hardly consider him a partner—no, sir; we have admitted a person who is to have an interest in the concern.

Q. He is to have an interest?

A. Yes, sir.

Q. Who is that gentleman?

A. Mr. D. M. Arndt.

Q. In the negotiations of the firm with Mr. Arndt, who had the conversation with him?

A. Mr. Drennen pretty largely, but during part of the conversation, or the greater part of it, I was present.

Q. Do you recollect on what basis he was to come in?

A. We supposed that we were worth over and above indebtedness

January 1st, 1883, about $65,000, more or less, and Mr. Arndt was to contribute $10,000, with the understanding that we were to organize a joint stock company, and each one was to have such a proportion of the stock as his investment in the firm represented.

Q. At what time did he put in his $10,000?

A. Somewhere about the latter part of June he put in $5,000 cash, and gave us a note about the first of July, I should think.

Q. Then he virtually paid into the concern $10,000 at that time?

A. Yes, sir.

Q. Did you increase your capital stock then by Mr. Arndt's payment, his cash and note, or did each one of the firm withdraw the amount he put in to that amount?

A. No, sir; that was paid in to be used as an addition to the stock.

Q. That virtually made your capital stock how much?

40 A. $75,000.

Q. His interest then would be 10–75ths?

A. Yes, sir.

Q. How did you arrive at that $65,000 in round figures, to show to Arndt the amount?

A. We had stock and fixtures about $113,000, and accounts and notes receivable $40,000, and we owed in the neighborhood of $90,000, which left a difference of about $65,000.

Q. Did that $65,000 include the profits that had been made in the previous business, that surplus of $65,000?

A. It did; yes, sir; made up to January first.

Q. Mr. Arndt came in in June?

A. Yes, sir.

Q. Was he to have an interest there from the first of last January?

A. He was to have a share of the profits from January first.

Q. Didn't he, at that time, receive any statement from you as regards how you arrived at your value?

A. I think not; I gave him none.

Q. Was not these figures, $31,223.32, added to the amount of the purchase and your sales, less estimated profits, deducted from that to show him about how you stood at that time, so far as your stock was concerned?

A. I do not quite comprehend you, sir.

Q. Didn't you take Exhibit "E," and take these figures, and add your purchase to it, then deduct therefrom your sales, less estimated profits, to arrive at about the amount of stock, to show him what your capital was at that time?

A. No, sir; I think no detailed statement was given; I think we told him we had so much money in stock and accounts over indebtedness.

41 The said extract from such examination was received in evidence.

Counsel for defendant then read from the said examination of Edward D. Everett, one of the plaintiffs as follows:

"Personally appeared Edward E. Everett, who, having been duly sworn, deposes and says he is a member of the firm of Drennen, Starr & Everett; that he will true answer make to any and all interrogatories propounded by J. Mabbit Brown in reference to their business and stock of goods, and any other questions considered pertinent, to sign the same when reduced to writing, which he hereby agrees shall be and become a part and parcel of any and all papers presented to the different insurance companies, in proof of loss by fire July 29th, 1883.

* * * * * * *

Q. When was Mr. Arndt admitted to the firm?

A. He came in there about six weeks before the fire, he wanted to take an interest, and we were going to make it a stock company as soon as we were able to, and that would be about the first of August.

Q. On what basis did he come in?

A. On the present worth of the concern. Drennen, Starr & Everett had $65,000 net—that is, over all liabilities.

Q. Do you know what your liabilities were at that time?

A. I don't know positive, but I think all kinds about $90,000.

Q. What was the amount of your assets at that time?

A. I went by the inventory; $115,000 and some fraction and also store fixtures, and we had a book account besides.

Q. What proportion of interest had Arndt in the concern?

A. $10,000 interest.

Q. Did that represent one-fourth, or one-fifth, or what?

A. No; he was to get in on the basis of $65,000, and we
42 were to make a stock company of $100,000, and he was to take $10,000, and Harmon was to take some, I don't know how much, but I think $5,000, and Drennen's brother was to take some.

Q. Didn't Arndt pay in any money?

A. Yes, sir; $5,000.

Q. Did he pay anything else toward his $10,000 interest?

A. He gave his note for the balance.

Q. Then virtually he paid his $10,000 by cash and note?

A. Yes, sir; he took $10,000 interest, and that is the way it was settled.

Q. Does his partnership date back to the first of January, 1883?

A. He was to come in and have an interest from January first, 1883. In that arrangement I did not do any talking with him; the talk was all done with Drennen and Starr. I was away from home at the time he came in, but that was my understanding of it.

Q. Was not the idea, or your views on the subject, that you three had a capital of $65,000, and Arndt put in $10,000, making $75,000, and you were to make a stock company out of it?

A. Yes, sir; we were going to make a stock company about the first of August.

Q. What would you call Arndt's interest?

A. $10,000 of the stock.

Q. In other words, 10–75ths at the time of the fire?

A. Yes, sir."

The foregoing extract from said examination was received in evidence:

The defendant's counsel then read from the said examination of the plaintiff, Eugene J. A. Drennan, as follows:

43 "Personally appeared E. J. A. Drennen, who, having been duly sworn, deposes and says he is a member of the firm of Drennan, Starr & Everett; that he will true answers make to any and all interrogatories propounded by J. Mabbett Brown in reference to their business and stock of goods, and any other questions considered pertinent, to sign the same when reduced to writing, which he hereby agrees shall be and become part and parcel of any and all papers presented to the different insurance companies in proof of loss by fire July 29th, 1883.

* * * * * * * *

"Q. Have you taken a partner since January, 1883?

A. No, sir; that is, we have not taken one in, and we have taken one in who has some money in; was to have an interest in it when we got up our stock organization.

"Q. Who was that?

"A. D. M. Arndt.

"Q. Upon what basis did he go in?

A. He went in on the basis that we were worth above liabilities $65,000, and he was to put in $10,000, which would have given him $\frac{1}{7}\frac{0}{5}$ interests in the concern when the stock was distributed, provided all the time we had $65,000; we were going upon that theory. If there had been any bad claims for goods sold before the first of January we were to make them good, but any sold after January first he was to stand his share of the loss. He was to pay $5,000, and did pay that, and he gave his note for $5,000.

"Q. Was he liable for any indebtedness that might be incurred subsequent to the first of January, 1883?

"A. No, sir; I suppose there is no liability resting upon him yet.

44 "Q. Was he to participate in the profits after the first of January, 1883?

"A. Yes, sir; he was to reach back to the first of January.

"Q. Then he was virtually a partner to the extent of $\frac{1}{7}\frac{0}{5}$ since the first of January.

"A. No, sir; not a partner for a penny; he was to go into the stock concern. He was to get a share of the profits of this year's business, while the other stockholders did not. He was to be interested from the first of January, and he was to pay interest from then until his interest was fully paid.

"Q. If he don't come in then Drennen, Starr & Everett own him $5,000 cash?

"A. Yes, sir."

The foregoing extract from said examination was received in evidence.

The defendant then offered as a witness Lewis Iott, who testified that he was one of the committee of adjusters for the defendant company, who investigated the plaintiffs' loss and conducted the examinations aforesaid. That when the committee called on the plaintiffs to investigate the loss Mr. Drennen, one of the plaintiffs, introduced the witness and Mr. Hughson to D. M. Arndt, saying: "This is Mr. Arndt, one of the members of our firm." That the plaintiff Drennen and Mr. Arndt then stated that Arndt had been actually engaged with the plaintiffs in the store since some time in June, and that he had had an interest in it for some time before.

During the negotiations concerning this loss plaintiffs exhibited to said committee a paper, which witness believed was (Exhibit "K") the written contract signed by Drennen, Starr & Arndt, and the committee took copies of it and sent them to each of the insurance companies interested.

45 The defendant then offered as a witness E. J. Hughson, one of the said committee of adjusters, who testified to the same facts stated by Mr. Iott as aforesaid, and also that Mr. D. M. Arndt, in the presence of the plaintiffs Drennen and Starr, handed the committee of adjusters a statement of the loss, saying that he had had charge of the books since the first part of June, and had made a statement of the loss which would help the adjusters materially; that the plaintiff also stated that Mr. Arndt had had charge of the books since that time.

This witness further testified as follows: "I remember of a conversation referring to a contract; my impression now is that Mr. Drennen said they had a contract, and we told them we would like to see it, and then Mr. Drennen brought it over, at least one of them did. I think it was the same contract marked Exhibit 'K' in this action. We made copies of it and sent them to each company interested. We had the paper in our possession, I think, at the time the examinations of the plaintiffs under oath were taken by us."

The defendant then rested.

The plaintiffs, to maintain the issues on their part and in rebuttal of the defendant's evidence, called as a witness Eugene J. A. Drennen, one of the plaintiffs, who testified that he never saw Mr. Arndt before about May 20, 1883, at which time Arndt called at the store to see Mr. Everett, one of the plaintiffs, who was then absent. Arndt
46 came from Sandusky, Ohio, where Everett and the wife of the witness formerly lived, and witness knew him by reputation as secretary of the Sandusky Water Works Company. That learning that Mr. Everett was absent, Mr. Arndt introduced himself to the witness, and from then until May 24, 1883, made the plaintiffs' store his headquarters. Witness drove Mr. Arndt about the city, and, after becoming acquainted with him, negotiations were opened which resulted in a written contract made on May 24, 1883, in words and figures as follows, to wit:

"This agreement, made and entered into this 24th day of May, A. D. 1883, by and between E. J. A. Drennan, F. W. Starr, and Ed-

ward D. Everett, who are now members of and constitute the firm of Drennen, Starr & Everett, all of the city of Minneapolis, parties of the first part, and D. M. Arndt, of the city of Sandusky, Ohio, party of the second part, witnesseth: Said parties of the first part hereby agree to receive into their business said Arndt on the following terms and conditions:

"1st. Said company is to become incorporated.

"2nd. Said Arndt is to pay into said firm for its use, on or before June 14th, 1883, five thousand dollars.

"3d. Said Arndt is to pay into said firm for its use, on or before January 1st, 1885, an additional sum of five thousand dollars.

"4th. Said Arndt is to pay said firm interest at the rate of 8 per cent. per annum on each of said sums of five thousand dollars from January 1st, 1883, till each of said sums shall be paid as aforesaid, the interest on the last-mentioned sum to be paid semi-annually.

"5th. If said Arndt shall be unable to pay said second $5,000 by January 1st, 1885, his interest shall be decreased 50 per cent., and until said last-mentioned sum of $5,000 shall be paid, or interest decreased as aforesaid, the liability of said Arndt therefor
47 shall be evidenced by his promissory note executed to said firm, bearing interest as aforesaid, and dated January 1st, 1883. The business to be carried on by the new company to be formed as aforesaid shall be of the same nature as that now conducted by Drennen, Starr & Everett; the name of the new company to be formed shall be determined hereafter.

"It is understood and agreed that of the effects and rights of the firm of Drennen, Starr & Everett said Drennen owns one-half and said Starr and Everett each one-fourth thereof. All said rights and effects shall be put into the corporation to be formed as aforesaid at their value as shown by the inventory taken January 1st, 1883, less any loss by reason of non-payment of any claim for goods sold by them before that time, and that to the amount to be contributed as aforesaid shall be added the sum of ten thousand dollars, to be paid by said Arndt as aforesaid.

"The interest and the shares of the several parties to this agreement in the new company shall be in proportion to the amount contributed by each to its capital stock according to the plan aforesaid.

"When a charter shall be procured as aforesaid 50 per cent. of the stock of said Arndt shall be held by said company, or some one in trust for it, till said second sum of $5,000, with accruing interest thereon, shall be paid. It is understood said Arndt is to attend to the book-keeping and office work of said business, and that each remaining partner of the firm of Drennen, Starr & Everett shall actively engage in the business of the new company; that no change in the name or character of the firm of Drennen, Starr & Everett shall be made until said corporation shall be formed.

48 "In testimony whereof said parties hereto set their signatures the day and year first herein written.

"E. J. A. DRENNEN.
"FRED. W. STARR.
"DAVID M. ARNDT."

That said contract was signed by him, and by said Starr and Arndt in his presence.

That Mr. Everett, one of the plaintiffs, was, at and during the negotiations and at the time of the contract, absent from Minneapolis, but returned early in June, 1883, and was made acquainted by his partners with the contents of the said written agreement, and assented thereto.

The written contract aforesaid was offered in evidence by the plaintiffs, and the defendants objected on the ground that the same was immaterial and incompetent; which objection the court overruled, and to which ruling the defendant then and there duly excepted, and said exception was duly noted and allowed.

The witness further testified that said D. M. Arndt returned to Sandusky, Ohio, upon the signing of said contract, and came back to Minneapolis on the 16th of June, 1883.

That the plaintiffs never made any other contract with Mr. Arndt than the one before mentioned and set forth in relation to the subject of that contract.

That the said contract was the final agreement made between the plaintiffs and said Arndt.

That when Mr. Arndt returned from Sandusky, Ohio, to Minneapolis he went into plaintiffs' office and was looking over the books to satisfy himself that it was all right and plaintiffs had something there, because at the time the said written contract was made Mr. Arndt had made no examination of plaintiffs' affairs for himself, but had received some statements from the plaintiffs in regard to their business.

49 The witness further testified that the money of said Arndt and his note were paid into the firm, as testified by Miss O'Brien, in pursuance of the written contract before set forth; that no change or transfer of general accounts was made in the books of the plaintiffs; that the books ran on up to the time of the fire the same as before the making of the written contract; that he did not deny the introduction of the said Arndt to the insurance adjusters, but had no recollection of it at all, and did not think he introduced him as said Iott and Hughson said he did; that from June 16th, 1883, up to the time of the fire said D. M. Arndt during business hours was most of the time in the store of the plaintiffs; that said Arndt assisted in preparing the proofs of this loss.

This witness further testified as follows: "The corporation referred to in the written contract (Exhibit 'K,') was never completed. We had expected to make the change August 1st. We had bought all our books for the new corporation, and were going to close up the old business on the first day of August. The new books spoken of were never opened; had not a scratch of a pen in them."

The contract (Exhibit "K") was handed to the adjusting committee very soon after they came to adjust the loss. I think about the first time they began business I remember they asked me if Mr. Arndt was a partner, and I told them we had a contract with Mr. Arndt, which would explain our relations better than I thought we could. They asked me to produce the paper, which I did. They

had this contract there in their room. I saw it there several times afterwards. This contract was handed over very early. I don't know that they had begun to sit as a committee of inquiry at that time.

The plaintiffs then offered as a witness Frederick W. Starr, who was one of the plaintiffs, and who testified that he had never known Mr. Arndt before the 20th or 22nd of May, 1883; that the written contract before set forth at length was the result of the negotiations between the plaintiffs and said Arndt, and was the only contract between the plaintiffs and said Arndt relative to a business con-
50 nection; that after Mr. Arndt's return to Minneapolis, about June 16, he didn't do much of anything, but looked round the office and through the stock, and tried to get familiar with the business, and answered a few letters and filed a few papers in the office; that he was present when said Arndt was introduced by plaintiff Drennen to witnesses Iott and Hughson; that his remembrance was that Drennen did not introduce said Arndt as a partner, but introduced witness as a partner, and then introduced said Arndt thus: "Mr. Iott, Mr. Arndt;" that he did not remember that Mr. Arndt made any remark there at that time about being a member "of the firm."

The following question was put to the witness by plaintiff's counsel:

Question. In the examination that was read there was this question that was put to you, "Was he to have an interest there from the first day of last January?" and your answer, as read, was, "He was to have a share of the profits from January first." I will ask you if you were speaking with reference to this contract that has been read?

This question was objected to by defendant's counsel on the ground that it was incompetent for the witness to explain or contradict the subscribed and sworn writing.

This objection was overruled by the court, to which ruling the defendant then and there duly excepted, and the exception was noted and allowed by the court.

Answer. "Yes, sir."

Witness further testified that after June 16, 1883, said Arndt was in and about the plaintiffs' place of business generally every day, and most of the day. That he examined the stock and wrote and filed letters for the firm, and did miscellaneous work about the office.

51 Witness stated that when he testified before the committee of insurance adjusters that said Arndt was to have a share, after profits, from January 1st, 1883. He referred to the clause of the written contract aforesaid, which reads thus: "All said rights and effects shall be put into the corporation to be formed as aforesaid, at their value, as shown by the inventory taken January 1st, 1883, less any loss by reason of non-payment of any claim for goods sold by them before that time, and that to the amount to be con-

tributed as aforesaid shall be added said sum of ten thousand dollars, to be paid by said Arndt as aforesaid."

That said Arndt was to have an interest in any profits of the plaintiffs firm from January 1st, 1883, and made between that date and the organization of a corporation, but the same not to be paid to him until the end of the year; that he signed the examination and intended to swear to it.

The witness further testified as follows:

The written contract (Exhibit "K") was handed over to the adjusters the afternoon of the day in which they got our books. This was the first day the committee went to work on the books, perhaps, the next day after we first saw them. Mr. Drennen and I went together to the Nicollet House, and Mr. Drennen gave this paper, with other papers, to the committee.

The plaintiffs next offered as a witness Edward D. Everett, one of the plaintiffs, who testified "That he had known Mr. Arndt a number of years in Sandusky, Ohio; that the written contract before set forth was the only contract made between the plaintiff firm and said D. M. Arndt, so far as witness knew."

The testimony was then closed and both sides rested.

52 Upon the foregoing admissions and testimony, which was all that was received or considered on said trial, the defendant prayed the court to charge the jury that—

"On the undisputed evidence in this case the jury are instructed that Mr. Arndt became a copartner in the insured property with the plaintiffs, Drennen, Starr & Everett, and was such copartner at the time of the fire, and your verdict must be for the defendants;" which charge the court refused to give, and the defendant then and there duly excepted to the said ruling, and said exception was then and there duly noted and allowed.

The defendant prayed the court to charge the jury that—

"The question is whether Arndt, in paying his money into the firm and executing his note to the firm, became a lender of money to the firm, and the firm a mere borrower from him, or whether he acquired an interest in the business and property of the firm itself as a member thereof."

On this subject the law is: "If it was not the understanding that Arndt became a lender to the concern, and if it was the understanding between the parties that the amount of his investment was to be risked in their business and become part of the capital stock, and he was to have a share of the net profits, he is not a mere lender, but a partner;" which charge the court refused to give, and the defendant duly excepted to the said ruling, and said exception was then and there duly noted and allowed.

The defendant prayed the court to charge the jury that—

"Where a person contributes a portion of the common capital which is mingled with the contributions of the other parties, and the whole is managed for the joint interests of those who contribute, the contributors each having a share of the net profits of the busi-

ness, they become thereby partners as between themselves
53 in the capital stock or property of the concern;" which charge the court refused to give, and the defendant then and there duly excepted to the said ruling, and said exception was then and there duly noted and allowed.

The court charged the jury that the making of the written contract, Exhibit "K," and the payment of money and giving of note by Arndt to plaintiffs, as shown, could not be considered as proving partnership relation between the plaintiffs and Arndt; and that the issue as to whether such partnership relation was formed must be determined from all the other testimony and facts in the case, outside and independent of said contract and payment under it; that said payment of money must not be considered as evidence of such partnership, but must be taken in connection with said contract and as part performance thereof."

The defendant then and there duly excepted to the said instruction so far as it excluded from the consideration of the jury the payment of said money and giving of said note as evidence upon the question of partnership, and said exception was then and there duly noted and allowed.

The court charged the jury as follows:

"Even if you should find from the evidence that the apparent relation between the plaintiffs and Arndt was such as would charge them as partners at the suit of creditors or third persons, that alone would be sufficient to constitute them as partners as between themselves, or to maintain the defense in this action—that is, Arndt might have an interest in the profits without being an actual partner."

To which charge the defendant then and there duly excepted, and the said exception was then and there duly noted and allowed.

The court charged the jury as follows:

54 "If you find from evidence that up to the time of the fire it was not the intention of the plaintiffs and Arndt to become partners, but that it was their intention to organize a corporation of which they should be members and stockholders, and that the goods and property of the plaintiffs should be transferred to said corporation when organized, and they should take stock in said corporation to the extent of the ascertained value thereof, and that Arndt should take stock in said corporation to the extent of ten thousand dollars contributed by him, and that no change should take place in the name or character of the firm of Drennen, Starr & Everett until such corporation should be organized, then the defense fails, and the plaintiffs are entitled to a verdict for the full amount of the policies, with interest, as claimed in the complaint. That is another way of putting it, that if there was no partnership—that is, if Arndt was not taken in as a partner—then the plaintiffs are entitled to recover."

To which charge the defendant then and there duly accepted, and the exception was then and there duly noted and allowed.

The court charged the jury as follows:

"If you find from the evidence that said Arndt was to be a participant in the profits realized from the business of the plaintiffs, to

a certain extent, from January 1st, 1883, this would not necessarily constitute him a partner in or joint owner of the goods and property of the plaintiffs insured by these policies. He might have an interest in such profits without having any joint title or interest with the plaintiffs in the ownership of their goods."

To which charge the defendant then and there duly excepted, and said exception was then and there duly noted and al-
55 lowed.

The court charged the jury as follows:

"If you find from the evidence that the plaintiffs, in consideration of Arndt's paying in $10,000, with interest thereon from January 1st, 1883, in advance of the formation of the contemplated corporation, agreed that he should receive a proportionate share of the profits of their business from said January 1st to the formation of said contemplated corporation, that fact would not have the effect to assign or transfer to him any title or interest in the insured goods or property of the plaintiffs in the absence of any agreement to that effect."

To which charge the defendont then and there duly excepted, and the exception was then and there duly noted and allowed.

The court charged the jury as follows:

"The defendant is entitled to contradict or vary the written contract of May 24, 1883, by parol evidence; and the parol evidence which has been received may be considered by you and is competent. And if you find from it that contemporaneous with the making of the written contract of May 24th the plaintiffs entered into a verbal contract of with Mr. Arndt for a present partnership, you are not precluded from finding that fact because of said written contract."

The jury thereupon, on the 14th day of September, 1885, rendered a verdict in said cause for the plaintiffs. Whereupon the defendant prayed for a bill of exceptions.

And whereas none of the aforesaid matters are of record, the above bill of exceptions is duly allowed, signed, and sealed during the term, this 16th day of October, A. D. 1885.

R. R. NELSON, *Judge.*

56 The within bill of exceptions found correct and may be signed by the court.

L. J. C. DRENNEN,
Plaintiffs' Att'y.
CAMERON, LOSEY & BUNN,
Defendant's Att'ys.

[Endorsed:] United States circuit court, district of Minn. Eugene J. A. Drennen *et al. vs.* The London Assurance Corporation. Filed Oct. 16, 1885. Oscar B. Harris, clerk.

57 Circuit Court of the United States, District of Minnesota.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. EVERETT, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION, Defendant.

Know all men by these presents that we, The London Assurance Corporation, as principal, and R. W. Cummings and Edward Cooley, as sureties, are held and firmly bound unto Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett in the full and just sum of eight thousand dollars, to be paid to the said Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, [and] administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22nd day of October, A. D. 1885.

Whereas lately at a term of the circuit court of the United States for the district of Minnesota, in a suit depending in said court between the said Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, as plaintiffs, and The London Assurance Corporation, as defendant, judgment was rendered against the said London Assurance Corporation; and the said London Assurance Corporation having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, citing and
58 admonishing them to be and appear at the Supreme Court of the United States the third Monday of the term, to wit, Monday, October 26th, 1885:

Now the condition of the above obligation is such that if the said The London Assurance Corporation shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

LONDON ASSURANCE CORPORATION, [SEAL.]
By GEORGE C. CLARKE,
General Agent.
R. W. CUMMINGS, [SEAL.]
EDWIN COOLEY, [SEAL.]

Sealed and delivered in presence of—
SEBASTIAN A. HARVEY.

H. H. PORT,
H. E. DAY,
W. T. DECELLE,
Witnesses to principal witnesses to sureties.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

R. W. Cummings and Edwin Cooley, being each duly sworn, each for himself deposes and says that he is a resident and freeholder of the State of Minnesota, and is worth the sum of eight thousand dollars over and above all his debts and liabilities and exclusive of property exempt from execution.

R. W. CUMMINGS AND
EDWIN COOLEY.

Subscribed and sworn to before me this 22nd day of October, 1885.

H. E. DAY,
Notary Public, Hennepin County.

Endorsed on back: "I hereby approve the within bond and grant a supersedeas. R. R. Nelson, judge. Filed Oct. 23rd, 1885. Oscar B. Hillis, clerk."

59 UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

Circuit Court of the United States.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 64 pages, numbered consecutively from *a* to 59, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 23rd day of October, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and tenth year.

[Seal U. S. Circuit Court, Dist. of Minnesota.]

OSCAR B. HILLIS, *Clerk.*

60 [Endorsed:] United States circuit court, district of Minnesota. Eugene J. A. Drennen *et al. vs.* The London Assurance Corporation. Return to Supreme Court.

61 United States Circuit Court, District of Minnesota.

Supplementary return in the case of EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. EVERETT, Partners in Business under the Firm Name and style of Drennen, Starr & Everett, Appellees,

vs.

THE LONDON ASSURANCE CORPORATION, Appellant.

L. J. C. Drennen and J. M. Shaw, attorneys for appellees; C. K. Davis and Cameron, Losey and Bunn, attorneys for appellant.

62 GENTLEMEN OF THE JURY:

This suit is brought to recover upon two policies of insurance covering a quantity of merchandize owned by the plaintiffs in this case, Messrs. Drennen, Starr & Everett, of the city of Minneapolis, issued by the London Assurance Corporation. The policies are dated the 10th day of March, 1883, and the fire occurred on the 29th day of July, 1883. It is admitted by stipulations which have been read to you that the plaintiffs are entitled to recover unless the defence set up in the answer of the defendants is sustained to your satisfaction by the weight of evidence.

Now, what is the defence which the defendant sets up in his answer? It is not urged here that there was any fraud upon the part of the plaintiffs when this contract was entered into. It is not claimed that any false representations were made by the plaintiffs when they obtained these policies, either with reference to the value of the property insured or that there was any regard to the value of the property destroyed by fire in the proofs of loss. It is claimed, however, that by the conditions of the policies the contract entered into between the London Assurance Corporation and the plaintiffs in this case there was a condition imposed upon and agreed to by both these parties which may have been violated by the plaintiffs and the policies thereby forfeited.

The principle clause in the policies and the one which is chiefly relied on is this: "If the property be sold or transferred"—

63 that is, the property covered by these policies—"or any change takes place in the title or possession, then, and in every such case, this policy shall be void." There is also another: "If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, then and in that case the policy shall be void."

The first condition which I read is claimed to have been violated by the plaintiffs in this case, and the policies forfeited thereby. The contention of the defendant is that there has been such a change after these policies issued, and before the fire, in the title or possession of the property within the terms of the policies as to avoid them. This is set up in the answer, but the reply of the plaintiffs denies the allegation that there has been any violation of the conditions of the policies as set forth in the answer. Now, the burden of proof is upon the defendant, and it must satisfy you by a prepond-

erance of evidence that this clause in the policies has been violated by these plaintiffs. It is urged and pleaded by the defendant that one David M. Arndt was admitted as a partner by the plaintiffs and took possession of the property jointly with the plaintiffs, so that there was a change in the title and possession of the property within the terms and conditions of the policies, which I have read to you. That is the fact relied upon by the defendant to defeat a recovery in this action.

Now, without citing the authorities or reading what was said by the court on the first trial, I will state that I am of the opinion that if Mr. Arndt was, within the meaning of that clause in the policy, interested in that partnership, and became a member of it
64 before the loss, and acquired an interest in these goods the policies were forfeited. So that the question is narrowed down to a very simple one for you to determine from the evidence, and that is, was Mr. Arndt admitted into this partnership, as I have stated to you? The burden of proof on that issue is upon the defendant to establish that fact by a preponderance of the evidence, and it must satisfy you that the plaintiffs sold and transferred to Arndt a joint interest with them, and took him into partnership with them, so that within the provisions of these policies a change took place in the title or possession of the property insured, and that that was done without the consent of the defendant. If that fact is established to your satisfaction it defeats a recovery in this case. If it is not established to your satisfaction by the weight of evidence, then the defendant has failed in his defence, and the plaintiffs are entitled to recover.

The testimony chiefly relied upon by the defendant to show that Arndt was admitted into the firm is, first, the payment of money by Arndt into the firm, as evidenced by the books of the firm and as disclosed by the evidence of Miss O'Brien, whose deposition was read by counsel to you; second, the admissions of Mr. Drennen, the senior member of the firm, and of Mr. Starr that Mr. Arndt was a partner. I am now stating to you the testimony that defendant relies on, the admissions that occurred when Drennen introduced Arndt to the adjusters as a partner, as testified to by Mr. Iott and Mr. Hughson; and again, the admissions in the examination of these partners, which occurred subsequent to the fire, when the adjustment of this loss was contemplated. To meet this the evidence of the plaintiffs in rebuttal is, first, the written contract for a
65 future corporation entered into by the plaintiffs and Mr. Arndt on the 24th of May, 1883, and also the evidence of the plaintiffs that no other contract was entered into between Arndt and them, except this contract on May 24th, 1883, which contemplated a future corporation.

In regard to the effect of the written contract dated May 24th, 1883, we have some light from the Supreme Court of the United States upon the question at issue, this case having been tried previously, and under the interpretation of that contract a verdict obtained from the jury when a writ of error was taken to the Supreme Court of the United States, and a reversal of the judgment obtained

upon the ground that the Court when instructing the jury gave them a misinterpretation of this written contract which has been in evidence before you. I might say that we have also light upon that question of the payment of money by Arndt, which is a part of the testimony introduced by the defendant, and relied upon by it to sustain its case.

The Supreme Court of the United States, upon page 56 of the 113 U. S. Reports, says, alluding to this agreement, which I will not read as you have heard it before: It appears in the fore front of the agreement that Arndt did not acquire an interest in the firm property immediately upon its execution, for the plaintiffs only agreed to receive him into their business on certain conditions thereafter to be performed. The first of these conditions was that the company—the one to be formed by the proposed connection between the plaintiffs and Arndt—should become incorporated. Then he was to pay into the firm for its use, on or before June 14th, 1883, the sum
66 of five thousand dollars, and a like sum on the first of January, 1885, the latter to be evidenced by his note, each sum to bear interest from January 1st, 1883, until paid. Finally, his interest was to be decreed fifty per cent. if he failed to pay the second $5,000 by January 1, 1885. The "business," that in which Arndt was to have an interest, "to be carried on by the new company to be formed as aforesaid, shall be of the same nature as that now conducted by Drennen, Starr & Everett." Then follows a declaration as to the property upon the basis of which the new company was to be organized, viz., all the rights and effects owned by Drennen, Starr and Everett, in the proportion of their respective interests, to be put into the corporation to be formed according to their value, as shown by the inventory of January 1, 1883, less any loss by reason of nonpayment for goods sold before that date, to which was to be added the $10,000 which Arndt agreed to pay, the interest of the several parties in the new company to be according to the amounts contributed by them, respectively, to its capital stock. These provisions all plainly point to an interest which Arndt was to acquire, not presently nor immediately upon the agreement being signed, but at some future period when the conditions set out in the agreement—not some, but all of them—were performed. When these conditions were satisfied, and not before, he would have been entitled to demand, as of right, the execution of the stipulation that he be received into the business then represented by Drennen, Starr and Everett, but thereafter to be represented by the new or incorporated company; that is, he was not to be received. This contract did not contemplate receiving him into the existing business of Drennen, Starr & Everett, but it was the business thereafter to be represented by the new or incorporated company. The parties appear, *ex industria*, to have excluded the possibility of his acquiring an interest in or control over the insured property in advance of the formation of an incorporated company.

67 Upon no other ground can the clause "that no change in the name or character of the firm of Drennen, Starr & Everett shall be made until said corporation shall be formed" be satis-

factorily accounted for. So that, as far as the contract is concerned, and the payment of that money under the conditions of that contract, it is no evidence of any new partnership being formed by the admission of Mr. Arndt. And when Judge Miller instructed the jury that by the making of this payment by Arndt in connection with the contract the status of these parties was defined, and a partnership existed, the Supreme Court said no. The instruction in the court below proceeded upon the ground that the payment by Arndt in cash, and money of the amount which he agreed to pay, and their receipt and entry upon the books of the firm to his credit, gave him an interest in the business; whereas such facts only established the performance of some, not of all, the conditions prescribed. In our judgment, looking at the whole agreement, the parties did not contemplate a partnership, and consequently none was ever established between them.

Now, as I have said before (the Supreme Court of the United States having given their decision with regard to the effect of the payment and the contract in writing here providing for a future corporation), the defendant must rely on the weight of some other evidence that there was a partnership entered into between these parties before the fire, and after the issuance of this policy, unknown to the defendant, and that thereby the right to recover is forfeited. We are, therefore, to consider this issue in the light of the decision, and it is for you to determine this issue upon the other testimony in this case—
68 that is to say, the admission of the parties on the examination before the adjusters, and all of the other facts in the case outside and independent of this contract, and the payment of money under it, as evidenced by the books of the firm. In considering the evidence in regard to these admissions, you are to take into consideration all of the facts in the case connected with it. Here were these adjusters sent on for the purpose of examining these parties with regard to this loss. They go and present themselves to the plaintiffs in the case, and ask for their books. Very proper; ask for all the papers and everything connected with the firm, so that a fair consideration may be had of the rights of the parties. There is no dispute but that an opportunity was given these adjusters to examine the books and all the papers, including the contract in writing, and they proceeded subsequently to examine the partners in regard to their rights and their relationship so as to determine, as far as possible, whether or not the company was responsible for the loss, and whether the plaintiff had any rights. You are to consider all the other evidence in connection with all these facts, including the whole examination with regard to the question at issue between the parties, not isolated answers to questions, but everything pertaining to the issue, and if you find that the clause of the policies has been violated, and that Mr. Arndt was really a member of the partnership, then the defendant is entitled to a verdict. If, however, after an examination of all the facts, you find the plaintiffs are entitled to recover, then, as the amount of the recovery is admitted, your
69 task is a simple one. The two policies amount to $6,000, and if the plaintiffs are entitled to recover they are entitled to a

verdict for $6,000, with interest at 7 per cent. from November 12th, 1883.

I submit this case to you, knowing full well that you will consider it with reference to the rights of both parties.

I will give the following request presented by the defendant: "The defendant is entitled to contradict or vary the written contract of May 24, 1883, by parol evidence, and the parol evidence which has been received may be considered by you, and is competent; and if you find from it that, contemporaneous with the making of the written contract of May 24th, the plaintiffs entered into a verbal contract with Mr. Arndt for a present partnership, you are not precluded from finding that fact because of said written contract."

Mr. BUNN: It seems to me your Honor has excluded from the consideration of the jury the payment of money as evidence of the establishment of a partnership.

The COURT: I do; I will give you the benefit of that. I think the payment of that money must be taken in connection with this contract as a performance of that contract.

The defendant then duly excepts to the ruling of the court thereon.

Defendant's Requests.

I. The question is whether Arndt, in paying the money into
70 the firm and executing his note to the firm, became a lender of money to the firm, and the firm a mere borrower from him, or whether he acquired an interest in the business and property of the firm itself as a member thereof.

On this subject the law is: If it was not the understanding that Arndt became a lender to the concern, and if it was the understanding between the parties that the amount of his investment was to be risked in their business and become part of the capital stock, and and he was to have a share of the net profits, he is not a mere lender, but a partner.

Which said request was duly refused by the court, and the defendant duly excepted to such refusal.

II. Where a person contributes a portion of the common capital, which is mingled with the contributions of the other parties, and the whole is managed for the joint interests of those who contribute, the contributors each having a share of the net profits of the business, they become thereby partners as between themselves in the capital stock or property of the concern.

Which said request was duly refused by the court, and the defendant duly excepted to such refusal.

III. On the undisputed evidence in this case the jury are instructed that Mr. Arndt became a copartner in the insured property with the plaintiffs, Dreenen, Starr, and Everett, and was such copartner at the time of the fire, and your verdict must be for the defendants.

Which said request was duly refused by the court and the defendant duly excepted to such refusal.

71 *Plaintiff's Requests.*

I. The principal question in this case for determination by the jury is whether D. M. Arndt became a partner with the firm of Drennen, Starr & Everett, and thereby an undivided interest and title in the goods of plaintiffs were transferred to him. The defendant affirms this and the plaintiffs deny it. The burden of proof is upon the defendant to establish it.

You are instructed that, in order to establish this, the defendant must show to your satisfaction, by a preponderance of evidence, that there was established between the plaintiffs and Arndt a full and actual relationship as between themselves (and that the intention was that Arndt should become a partner with plaintiffs), and that there should be transferred and assigned to him an undivided interest and title in the insured goods and property of plaintiffs.

Which said request was duly given by the court, with the exception of the portion herein enclosed in parenthesis; to the refusal to give which enclosed portion the plaintiff duly accepted.

II. Even if you should find from the evidence that the apparent relation between the plaintiffs and Arndt was such as would charge them as partners at the suit of creditors or third persons, that alone would not be sufficient to constitute them partners as between themselves, or to maintain the defence in this action.

72 The COURT: That is, Arndt might have an interest in the profits without being an actual partner.

Which said request was duly given by the court.

III. Unless you find from the evidence that it was the intention of the plaintiffs and Arndt to become partners, as between themselves, and that an undivided interest and title in the insured goods and property of the plaintiffs should pass to and vest in Arndt, then your verdict should be for the plaintiffs for the full amount of the policies, with interest, as claimed in the complaint.

Which said request the court refused to give, except as the same was given in the general charge; to which refusal the plaintiff duly excepted.

IV. The real question for you to determine is, did a partnership in fact exist between Arndt and the plaintiffs as between themselves, so as to transfer to Arndt a joint interest and title in the insured property at some time during the period between the delivery of the policies and the happening of the loss, and this without reference to whether they could be held by outside parties dealing with them as partners. The introduction of Arndt as a partner to an outside party (as an act of civility), without objection or dissent on Arndt's part, might, under some circumstances, be sufficient to make him liable as a partner to the creditors of the firm, but it would not of itself constitute him an actual partner with plaintiffs, such as would be necessary to constitute a defence in this action.

The words "as an act of civility" were struck out by the court. The court refused to give such request, except as embodied in the general charge, and the plaintiffs duly excepted to such refusal.

73 V. There is evidence in this case to the effect that the

plaintiffs and said Arndt entered into a certain written agreement concerning the business relations to exist between them; which agreement is before you, and which was signed by Drennen and Starr, of plaintiffs' firm, and Arndt; that this agreement was not signed by Everett, because at the time of signing it by the parties mentioned he was absent; that he was informed of its import on his return and assented to it; that thereafter Arndt paid plaintiffs five thousand dollars and delivered to them his note for the payment of an additional five thousand, both pursuant to said written agreement; that Arndt was credited on plaintiffs' books with this money and note. If you find all these several matters to be true they would not be sufficient to constitute Arndt a partner with plaintiffs as between themselves, nor transfer to him any title in the goods and property insured in and by said policies of insurance.

Which said request was duly refused by the court, except as the same was embodied in the general charge.

VI. The written agreement before referred to, assented to by Everett, would not constitute Arndt a partner with the plaintiffs, nor would it, together with any acts done by any of the plaintiffs or by Arndt in pursuance of it, have that effect.

Which said request was duly given by the court.

VII. If you find from the evidence that up to the time of the fire it was not the intention of the plaintiffs and Arndt to become partners, but that it was their intention to organize a corporation, of which they should be members and stockholders, and that the goods and property of plaintiffs should be transferred to said corporation when organized, and they should take stock in said corporation to the extent of the ascertained value thereof, and that Arndt should take stock in said corporation to the extent of ten thousand dollars contributed by him, and that no change should take place in the name or character of the firm of Drennen, Starr and Everett until such corporation should be organized, then the defence fails, and the plaintiffs are entitled to a verdict for the full amount of the policies, with interest as claimed in the complaint.

74

The COURT: That is another way of putting it, that if there was no partnership—that is, if Arndt was not taken in as a partner, then the plaintiffs are entitled to recover.

Which said request was duly given by the court.

VIII. If you find from the evidence that said Arndt was to be a participant in the profits realized from the business of the plaintiffs to a certain extent from January 1st, 1883, this would not necessarily constitute him a partner in, or joint owner of, the goods and property of plaintiffs insured by these policies. He might have an interest in such profits without having any joint title or interest with plaintiffs in the ownership of their goods.

Which said request was duly given by the court; and to the giving of such request the defendant then and there duly excepted.

IX. The plaintiffs have testified that there was no contract between them and Arndt with respect to their relations with Arndt other than the written contract of May 24th, 1883. If you find this

to be true, then you are instructed that that contract and the
75 payment of money and giving of note by Arndt to plaintiffs in pursuance of it did not constitute Arndt a partner with plaintiffs. But it is claimed by defendant that the evidence offered by it of the statement of plaintiffs to the committee of insurance adjusters tends to show that there was some other contract by which Arndt was constituted such partner. It is also testified on the part of both plaintiffs and defendant that the said written contract was submitted to said committee as defining the relations between plaintiffs and Arndt. If you find that the statements made by plaintiffs to said committee had reference only to said written contract and were intended to be in explanation of it, then you are instructed that such statements do not necessarily tend to show any other contract between plaintiffs and Arndt, nor to establish any partnership relation between them.

Which said request was duly refused by the court, except as embodied in the general charge.

X. The statements made by plaintiffs to the committee of insurance adjusters are offered by defendant as admissions of partnership relations between plaintiffs and Arndt. If the plaintiffs and Arndt did in May, 1883, enter into a contract fixing their relations to each other, and such contract does not establish a partnership relation as existing at any time before the happening of the loss sued for, no admissions of plaintiffs subsequent to such loss can be held as establishing such partnership relations.

Which said request was refused by the court, except as embodied in the general charge.

76 XI. If you find from the evidence that the plaintiffs, in consideration of Arndt's paying in $10,000, with interest thereon from January 1st, 1883, in advance of the formation of the contemplated corporation, agreed that he should receive a proportionate share of the profits of their business from said January 1st to the formation of said contemplated corporation, that fact would not have the effect to assign or transfer to him any title or interest in the insured goods or property of the plaintiffs in the absence of any agreement to that effect.

Which said request was duly given by the court.

XII. You are further instructed that if, after the making of said policies and before said loss, there had been a copartnership relation created between said plaintiffs and said Arndt, whereby there had been transferred and conveyed to said Arndt a joint and undivided interest and title with said plaintiffs in the said insured property, such fact would not have the effect to wholly avoid said policies of insurance, but that said plaintiffs might still recover at least a proportionate amount upon the policies sued upon to the extent of their remaining title and interest in said insured property.

Which said request was duly refused by the court.

The plaintiffs except to the refusal of the court to give each and every one of the requests presented by the plaintiffs.

The defendant excepts to the giving by the court of each and every one of plaintiffs' requests as given by the court.

The defendant excepts to that portion of the general charge which is embraced in the opinion of the United States Supreme Court, cited by the court from the 113 U. S. Reports.

77 UNITED STATES OF AMERICA, *District of Minnesota*, } ss:

Circuit Court of the United States.

I, Oscar B. Hillis, clerk of the said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing supplemental return, consisting of 15 pages, numbered consecutively from 1 to 15, inclusive, is a true and correct copy of the charge of this court given to the jury upon the trial of said cause and agreed to be such by the attorneys for the respective parties.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at St. Paul, in the district of Minnesota, this 10th day of November, A. D. 1885.

[U. S. Circuit Court Seal, Dist. of Minnesota.]

OSCAR B. HILLIS, *Clerk.*

Endorsed on cover: Minnesota C. C. U. S. No. 1222. The London Assurance Corporation, plaintiff in error, *vs.* Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, partners as Drennen, Starr & Everett. Filed November 21, 1885.

116-461

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

(No. 1,222.)

THE LONDON ASSURANCE CORPORATION, *Plaintiff in Error*,

vs.

EUGENE J. A. DRENNAN, FREDERICK W. STARR, AND EDWARD D. EVERETT, Partners, AS DRENNAN, STARR & EVERETT, *Defendants in Error*.

ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MINNESOTA.

ARGUMENT FOR PLAINTIFFS IN ERROR.

C. K. DAVIS,
C. W. BUNN,
Counsel for Plaintiff in Error.

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ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MINNESOTA.

STATEMENT.

This suit was brought upon two policies of insurance made by the plaintiff in error to the defendants in error upon a stock of merchandize. The policies were executed March 10, 1883, and the property insured was destroyed by fire July 29, 1883.

At the trial the company withdrew several defenses alleged in its answer, and relied upon the defense that, between the date of the execution of the policies and the date of the fire, there had been a change of ownership, title, and possession of the property insured, and that the policies became thereby void.

Each policy contains the following stipulations: "If the property be sold or transferred, or any change takes place in title or possession, (except by succession by reason of the death of the insured,) whether by legal process or judicial decree, or voluntary transfer or conveyance, * * * then, and in every such case, this policy shall be void." (Record, p. 6, fol. 5.)

"If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, * * * it must be so represented to

the corporation, and expressed in the written part of this policy; otherwise the policy shall be void. When property has been sold or delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate." (Record, p. 7, folio 6.)

The policies were attached to the complaint, and made part thereof, and the answer set up these stipulations, and contains the following averments, (Record, pp. 23, 24:)

"That on or about the said twenty-fourth day of May, 1883, the plaintiffs became copartners with one David M. Arndt, under the firm name of Drennan, Starr & Everett, in the property insured, and that they and said David M. Arndt have ever since continued to be such copartners, and said David M. Arndt is a necessary party to this action."

"That on May 24, 1883, the said insurance terminated, and the policies became void by the admission of said David M. Arndt as a copartner, as before stated; that thereby the said plaintiffs sold, transferred, and assigned to said David M. Arndt a joint interest with them as copartner in the insured property, and the said David M. Arndt was admitted into copartnership by the plaintiffs and took possession of said property jointly with the plaintiffs, and thereby the plaintiffs' title, interest, and possession was changed by their voluntary act, without the knowledge or consent of this defendant."

This action has been twice tried. Upon the first trial the circuit court held that the written contract (Record, pp. 40, 41) constituted Mr. Arndt a copartner with the assured, and, so ruling, excluded parol evidence offered by the present plaintiffs in error going also to show such a copartnership. But this court on a writ of error reversed this decision; holding that the written contract had no relation to the subject, and had sole reference to the future formation of a corporation which had not been organized when the fire occurred. *Drennan et al.* v. *London Assurance Corp.*, 113 U. S. p. 51.

Upon the second trial, on the contrary, it being settled by the decision of this court that the written contract did not relate to the question of Arndt's alleged partnership at the time and prior to the fire, the court admitted considerable parol evidence tending to show such a partnership relation. This evidence consisted largely of the testimony, under oath, given by each of the assured defendants in error as part of their proofs of loss to the insurance company. This evidence was as follows:

The defendant, to sustain the issues on its part, offered as a witness Miss Allie O'Brien, the book-keeper of the defendant, who testified that on the eighteenth day of June, 1883, the plaintiffs received from one D. M. Arndt the sum of five thousand dollars in money, which they thereupon placed to the credit of said David M. Arndt's individual name upon the account-books of said plaintiffs, and was deposited in the bank to the credit of the plaintiffs; that on the third day of July, 1883, said Arndt made and delivered to plain-

tiffs his promissory note for five thousand dollars, payable eighteen months after date, which was also entered in the account-books of the plaintiffs to the credit of said David M. Arndt's individual name, and was received by plaintiffs as other bills receivable received by plaintiffs in their business. (Record, pp. 35, 36.)

The defendant next offered P. M. Endsley, a notary public, who testified that he took the examination of each one of the plaintiffs, in relation to their claim for the insurance, by question and answer, under the clauses of the policies relative to proofs of loss. He identified three papers shown him as those examinations so taken down by him. His own signature and seal as notary public were attached to each examination, and the signature of each plaintiff was attached to the examination of such plaintiff; that the several plaintiffs either signed the examinations before him or took them away to examine, and brought them back signed, and each swore to the examination subscribed by him before the witness; that any alterations were made by the several parties, and made before the examinations were sworn to. (Record, p. 36.)

"Personally appeared F. W. Starr, who, having been duly sworn, deposes and says he is a member of the firm of Drennan, Starr & Everett; that he will true answers make to any and all interrogatories propounded by J. Mabbit Brown in reference to their business and stock of goods, and any other questions considered pertinent; to sign the same when reduced to writing, which he hereby agrees shall be and become a part and parcel of any and all papers presented to the different insurance companies in proof of the loss by fire July 29, 1883.

* * * * * * *

"Q. Since the first of January, 1883, you have admitted a new partner, have you not?

"A. We hardly consider him a partner,—no, sir; we have admitted a person who is to have an interest in the concern.

"Q. He is to have an interest?

"A. Yes, sir.

"Q. Who is that gentleman?

"A. Mr. D. M. Arndt.

"Q. In the negotiations of the firm with Mr. Arndt, who had the conversation with him?

"A. Mr. Drennen pretty largely; but during part of the conversation, or the greater part of it, I was present.

"Q. Do you recollect on what basis he was to come in?

"A. We supposed that we were worth, over and above indebtedness, January 1, 1883, about $65,000, more or less, and Mr. Arndt was to contribute $10,000, with the understanding that we were to organize a joint-stock company, and each one was to have such a proportion of the stock as his investment in the firm represented.

"Q. At what time did he put in his $10,000?

the corporation, and expressed in the written part of this policy; otherwise the policy shall be void. When property has been sold or delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate." (Record, p. 7, folio 6.)

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"Q. Do you recollect on what basis he was to come in?

"A. We supposed that we were worth, over and above indebtedness, January 1, 1883, about $65,000, more or less, and Mr. Arndt was to contribute $10,000, with the understanding that we were to organize a joint-stock company, and each one was to have such a proportion of the stock as his investment in the firm represented.

"Q. At what time did he put in his $10,000?

"A. Somewhere about the latter part of June he put in $5,000 cash, and gave us a note about the first of July, I should think.

"Q. Then he virtually paid into the concern $10,000 at that time?

"A. Yes, sir.

"Q. Did you increase your capital stock, then, by Mr. Arndt's payment, his cash and note, or did each one of the firm withdraw the amount he put in to that amount?

"A. No, sir; that was paid in to be used as an addition to the stock.

"Q. That virtually made your capital stock how much?

"A. $75,000.

"Q. His interest then would be 10-75ths?

"A. Yes, sir.

"Q. How did you arrive at that $65,000, in round figures, to show to Arndt the amount?

"A. We had stock and fixtures about $113,000, and accounts and notes receivable $40,000, and we owed in the neighborhood of $90,000, which left a difference of about $65,000?

"Q. Did that $65,000 include the profits that had been made in the previous business, that surplus of $65,000?

"A. It did; yes, sir; made up to January 1st.

"Q. Mr. Arndt came in in June?

"A. Yes, sir.

"Q. Was he to have an interest there from the first of last January?

"A. He was to have a share of the profits from January 1st.

"Q. Didn't he, at that time, receive any statement from you as regards how you arrived at your value?

"A. I think not; I gave him none.

"Q. Was not these figures, $31,223.32, added to the amount of the purchase, and your sales, less estimated profits, deducted from that, to show him about how you stood at that time, so far as your stock was concerned?

"A. I do not quite comprehend you, sir.

"Q. Didn't you take Exhibit E, and take these figures, and add your purchase to it, then deduct therefrom your sales, less estimated profits, to arive at about the amount of stock to show him what your capital was at that time?

"A. No, sir; I think no detailed statement was given. I think we told him we had so much money in stock and accounts over indebtedness." (Record, pp. 36, 37.)

"Personally appeared Edward E. Everett, who, having been duly sworn, deposes and says he is a member of the firm of Drennen, Starr & Everett; that he will true answer make to any and all interrogatories propounded by J. Mabbit Brown in reference to their business and stock of goods, and any other questions considered pertinent; to sign the same when reduced to writing, which he hereby agrees shall be and become a part and parcel of any and all papers presented to

the different insurance companies in proof of loss by fire July 29, 1883.

* * * * * * *

"Q. When was Mr. Arndt admitted to the firm?

"A. He came in there about six weeks before the fire; he wanted to take an interest, and we were going to make it a stock company as soon as we were able to, and that would be about the first of August.

"Q. On what basis did he come in?

"A. On the present worth of the concern. Drennen, Starr & Everett had $65,000 net; that is, over all liabilities.

"Q. Do you know what your liabilities were at that time?

"A. I don't know positive, but I think all kinds about $90,000.

"Q. What was the amount of your assets at that time?

"A. I went by the inventory; $115,000 and some fraction, and also store fixtures, and we had a book-account besides.

"Q. What proportion of interest had Arndt in the concern?

"A. $10,000 interest.

"Q. Did that represent one-fourth or one-fifth, or what?

"A. No; he was to get in on the basis of $65,000, and we were to make a stock company of $100,000, and he was to take $10,000, and Harmon was to take some,—I don't know how much, but I think $5,000,—and Drennen's brother was to take some.

"Q. Didn't Arndt pay in any money?

"A. Yes, sir; $5,000.

"Q. Did he pay anything else towards his $10,000 interest?

"A. He gave his note for the balance.

"Q. Then, virtually, he paid his $10,000 by cash and note?

"A. Yes, sir; he took $10,000 interest, and that is the way it was settled.

"Q. Does his partnership date back to the first of January, 1883?

"A. He was to come in and have an interest from January 1, 1883. In that arrangement I did not do any talking with him; the talk was all done with Drennen and Starr. I was away from home at the time he came in, but that was my understanding of it.

"Q. Was not the idea, or your views on the subject, that you three had a capital of $65,000, and Arndt put in $10,000, making $75,000, and you were to make a stock company out of it?

"A. Yes, sir; we were going to make a stock company about the first of August.

"Q. What would you call Arndt's interest?

"A. $10,000 of the stock.

"Q. In other words, 10-75ths, at the time of the fire?

"A. Yes, sir." (Record p. 38.)

"Personally appeared E. J. A. Drennen, who, having been duly sworn, deposes and says he is a member of the firm of Drennen, Starr & Everett; that he will true answers make to any and all interrogatories propounded by J. Mabbit Brown in reference to their business and stock of goods, and any other question considered per-

tinent; to sign the same when reduced to writing, which he hereby agrees shall be and become part and parcel of any and all papers presented to the different insurance companies in proof of loss by fire July 29, 1883.

* * * * * * *

"Q. Have you taken a partner since January, 1883?

"A. No, sir; that is, we have not taken one in, and we have taken one in who has some money in; was to have an interest in it when we got up our stock organization.

"Q. Who was that?

"A. D. M. Arndt.

"Q. Upon what basis did he go in?

"A. He went in on the basis that we were worth, above liabilities, $65,000, and he was to put in $10,000, which would have given him 10-75th interest in the concern when the stock was distributed, provided all the time we had $65,000. We were going upon that theory. If there had been any bad claims for goods sold before the first of January we were to make them good, but any sold after January 1st he was to stand his share of the loss. He was to pay $5,000, and did pay that, and he gave his note for $5,000.

"Q. Was he liable for any indebtedness that might be incurred subsequent to the first of January, 1883?

"A. No, sir; I suppose there is no liability resting upon him yet.

"Q. Was he to participate in the profits after the first of January, 1883?

"A. Yes, sir; he was to reach back to the first of January.

"Q. Then he was virtually a partner to the extent of 10-75 since the first of January?

"A. No, sir; not a partner for a penny. He was to go into the stock concern. He was to get a share of the profits of this year's business, while the other stockholders did not. He was to be interested from the first of January, and he was to pay interest from then until his interest was fully paid.

"Q. If he don't come in then, Drennen, Starr & Everett owe him $5,000 cash?

"A. Yes, sir." (Record, p. 39.)

ASSIGNMENT OF ERRORS.

(1) The court erred in refusing to charge the jury (Record, p. 41) "that on the undisputed evidence in this case the jury are instructed, that Mr. Arndt became a copartner in the insured property with the plaintiffs, Drennan, Starr & Everett, and was such copartner at the time of the fire, and your verdict must be for the defendants.

(2) The court erred (Record, p. 44) in refusing to charge the jury "that the question is whether Arndt, in paying his money into the firm and executing his note to the firm, became a lender of money to the firm, and the firm a mere borrower from him, or whether he acquired an interest in the business and property of the firm itself as a member thereof. On this subject the law is: 'If it was not the understanding that Arndt became a lender to the concern, and if it was the understanding between the parties that the amount of his investment was to be risked in their business and become part of the capital stock, and he was to have a share of the net profits, he is not a mere lender, but a partner;' which charge the court refused to give, and the defendant duly excepted to the said ruling, and said exception was then and there duly noted and allowed."

(3) The court erred in refusing to charge the jury (Record, p. 44) "that where a person contributes a portion of the common capital which is mingled with the contributions of the other parties, and the whole is mingled for the joint interests of those who contribute, the contributors each having a share of the net profits of the business, they become thereby partners, as between themselves, in the capital stock or property of the concern."

(4) The court erred in instructing the jury (Record, p. 45) "that the making of the written contract, Exhibit K, and the payment of money and giving of note by Arndt to plaintiffs, as shown, could not be considered as proving partnership relation between the plaintiffs and Arndt; and that the issue as to whether such partnership relation was formed must be determined from all the other testimony and facts in the case, outside and independent of said contract and payment under it; that said payment of money must not be considered as evidence of such partnership, but must be taken in connection with said contract and as part performance thereof."

5. The court erred in instructing the jury, (Record, p. 45:) "Even if you should find from the evidence that the apparent relation between the plaintiffs and Arndt was such as would charge them as partners at the suit of creditors or third persons, that alone would not be sufficient to constitute them as partners between themselves, or to maintain the defense in this action; that is, Arndt might have an interest in the profits without being an actual partner."

6. The court erred in instructing the jury, (Record, p. 45:) "If you find from evidence that up to the time of the fire it was not the intention of the plaintiffs and Arndt to become partners, but that it

was their intention to organize a corporation of which they should be members and stockholders, and that the goods and property of the plaintiffs should be transferred to said corporation when organized, and they should take stock in said corporation to the extent of the ascertained value thereof, and that Arndt should take stock in said corporation to the extent of ten thousand dollars contributed by him, and that no change should take place in the name or character of the firm of Drennen, Starr & Everett until such corporation should be organized, then the defense fails, and the plaintiffs are entitled to a verdict for the full amount of the policies, with interest, as claimed in the complaint. That is, another way of putting it, that if there was no partnership,—that is, if Arndt was not taken in as a partner,—then the plaintiffs are entitled to recover."

7. The court erred in instructing the jury, (Record, p. 45:) "If you find from the evidence that said Arndt was to be a participant in the profits realized from the business of the plaintiffs, to a certain extent, from January 1, 1883, this would not necessarily constitute him a partner in, or joint owner of, the goods and property of the plaintiffs insured by these policies. He might have an interest in such profits without having any joint title or interest with the plaintiffs in the ownership of their goods."

8. The court erred in instructing the jury, (Record, p. 46:) "If you find from the evidence that the plaintiffs, in consideration of Arndt's paying in $10,000, with interest thereon from January 1, 1883, in advance of the formation of the contemplated corporation, agreed that he should receive a proportionate share of the profits of their business from said January 1st to the formation of said contemplated corporation, that fact would not have the effect to assign or transfer to him any title or interest in the insured goods or property of the plaintiffs, in the absence of any agreement to that effect."

ARGUMENT.

I.

We will consider the first three assignments of errror together.. It will be observed by the court that the bill of exceptions is certified to contain all the testimony given upon the trial. (Record, p. 34.)

The plaintiff in error requested the court to direct a verdict in its favor. (See first assignment of error, *supra*.) The plaintiff in error also requested two further instructions, contained in the assignments 2 and 3, *supra*, which are inseparable from the principal question presented by the first assignment; and the three can be appropriately discussed under one head.

Where the bill of exceptions is certified to contain all the evidence, and where the court, upon all the evidence, was requested to direct a verdict, and the exception to the refusal so to instruct the jury is properly preserved, this court, under the authorities, will examine the question, and determine upon all the evidence whether, as a matter of law, the verdict ought to have been directed as requested; and if it ought to have been directed, error has been committed.

> *Lancaster* v. *Collins*, 6 Sup. Court Rep. 33. (Opinion of this court filed November 2, 1885.)

(*a*) Each of the defendants in error, shortly after the fire, was examined under oath before a notary public, and subscribed and swore to certain depositions which contained a stipulation, on the part of the subscriber, that the said deposition was made a part of the proofs of loss, and was furnished to the insurers as such. (Record, pp. 37, 38, 39.) It was affirmatively proven that each of said depositions was read over by the person subscribing and swearing to the same before it was subscribed and sworn to, and each deposition was corrected by him in some minor particulars before being signed. (Record, p. 36.) The extracts from these depositions which are material upon this question are contained in the bill of exceptions in the record, and are fully set forth in our statement of the facts, *supra*. Without repeating the testimony in this connection at length, the sum and substance of it is this: that in June, 1883, prior to the time when the formation of a corporation was contemplated, Mr. Arndt paid into the firm $5,000 in cash, and in July gave the firm his note for an additional $5,000; the cash going into the bank account of the firm to its credit, and the note going into its assets, and credited on its books with other bills receivable; that the firm at the time of this contribution estimated itself to be worth $65,000, and that this $10,000 contributed by Arndt was an addition to the *capital stock*. Each of the defendants in error testified, in those examinations, that by

virtue of this contribution, and under the understanding with Mr. Arndt upon the subject, Arndt was entitled to ten seventy-fifths of the net profits of the firm realized between January 1, 1883, and the time when the formation of the corporation was contemplated. It is to be noted that although Mr. Drennan testifies that Mr. Everett was not present when this arrangement was entered into, it was afterwards stated to him, and he ratified it, and understood the arrangement with Arndt in the same manner as his two copartners. (Record, p. 42.) (See, also, testimony of Mr. Everett, p. 38.)

In other words, it appears conclusively by the sworn testimony of each one of the defendants in error that in the interim before the organization of the contemplated corporation, Arndt was a contributor of 10-75ths of the *capital stock* in the partnership of Drennen, Starr & Everett, and entitled, by virtue of such contribution, and not as a salary for services, or as interest on his money, to 10-75ths of the net profits of the copartnership.

It also appears from the testimony of Starr (Record, p. 43) that Mr. Arndt returned to Minneapolis about June 16th, looked round the office and through the stock, tried to get familiar with the business, and answered a few letters, and filed a few papers in the office. It also appears (Record, p. 40) from the testimony of the witnesses Iott and Hughson that when the committee of adjusters called upon the plaintiffs after the loss, Mr. Drennen, one of the defendants in error, introduced Mr. Arndt to each of them, saying, "This is Mr. Arndt, one of the members of our firm," and stated that Arndt had been actually engaged with the plaintiffs in the store since some time in June, and had had an interest in it for some time before, and that he had had charge of the books since the first day of June, and had made an estimate of the loss which would help the adjusters materially. It appears (Record, p. 40) that Arndt came to Minneapolis from Sandusky, Ohio, where he had previously resided, and immediately, on or about May 24, 1883, consummated the negotiations and returned to Sandusky for a few days, came back early in June, and made his contribution when he came back; and from that time until the fire remained daily in the office and store of the defendants in error in Minneapolis.

Arndt not only contributed his services, but he contributed $10,000 to the capital stock of the concern. He was entitled, not to a share of the *gross profits*, nor a share of the *profits for services*, but to a share of the *net profits as such*, in the proportion which his investment of capital bore to the investment of the others, viz., 10-75ths. This arrangement would seem to have covered all losses, and Arndt was at least obliged to bear his proportion of the losses arising from the contraction of bad debts after the first day of January. (Record, p. 39, testimony of Drennen.) Beyond that, it was not believed by either party that the business would be run at a loss. But in the formation of a partnership, if there shall be no agreement as to the division of loss, the general provisions of law provide for such a case,

and determine, without the agreement of the parties, how any possible loss must be adjusted. Arndt's proportion of the profits was 10-75ths, he having invested $10,000, and the other partners $65,000, in the capital of the firm. The firm would owe Arndt, and would owe each partner, upon a dissolution, for any loss of capital which the final settlement of the business should show had been suffered.

Mr. Starr, one of the members of the firm, upon the trial in the circuit court as a witness on behalf of the plaintiffs in the court below, testified (Record, p. 44) "that said Arndt was to have an interest in any profits of the firm from the first day of January, 1883, and made between that date and the organization of a corporation, but the same not to be paid him until the end of the year."

This is the plain, simple, and uncontradicted testimony in the case, and we submit that the other testimony of the defendants in error upon the trial did not contradict or necessarily conflict with the evidence which we have quoted. The evidence which is relied upon by the defendants in error as contradicting or denying this state of facts is as follows:

Mr. Drennan (Record, p. 42) testifies that the plaintiffs never made any other contract with Mr. Arndt than the one before mentioned (which was the written contract for the formation of a corporation) and set forth, in relation to the subject of that contract. Mr. Starr testifies that, in his examination before the adjusters, where he stated that Arndt was to have an interest from the first day of January and a share of the profits from January 1st, he was speaking with reference to this written contract. But the court has construed this contract, and has decided that it had sole relation to the formation of a corporation, and there is no word or syllable in that contract giving Arndt any right to the profits before the formation of the corporation, or having the slightest relation to a partnership between the parties. In other words, it had sole relation to a future condition of things, and left untouched the relation of the parties in the interim. The time for its performance or consummation had not arrived at the time of the fire. Mr. Everett also testifies that this written contract was the only contract made between the plaintiff's firm and said D. M. Arndt, as far as he knew. (Record, p. 44.)

This testimony strikes us as clearly equivocal and evasive, and in no manner contradicting in any way the testimony which the witnesses gave, and which we have quoted, touching the relations of the parties prior to the fire, and existing at the time of the fire. It is, at most, merely a statement of a conclusion of law by these parties, for the reason that from the undenied facts the law imputed a partnership relation up to the time when the corporation should be formed.

To say, as these parties did say on the trial, that the written contract was the only contract between their firm and D. M. Arndt relating to the subject, is in one sense technically correct, because the

sole subject touched by the written contract was the formation of a corporation; and this testimony is entirely consistent with the admitted understanding which the parties say they had with Arndt, that, prior to the consummation of the written contract, Arndt was to have 10-75ths of their profits. The attempt to deny and avoid the conclusion which the law draws from such an arrangement or understanding between the parties, and the relations which were admitted to exist between them, prior to and at the date of the fire, is an evasion and a quibble upon the legal effect of those acknowledged relations and the legal meaning of the term "contract." It may be and probably is true that the parties never had any other *written* contract between them. It may be and probably is true that they never deliberated upon their legal *status* prior to the formation of the corporation, and never had any other contract relating to the subject of the written contract. But such a state of affairs being given as is disclosed by the testimony of each of the defendants in error, the law conclusively imputes a partnership relation. It was one upon which Arndt could have successfully maintained a bill for dissolution and an accounting, if the other parties had refused to form a corporation. It was one which he could so assert to-day.

We shall not dispute the proposition that we are bound to establish a partnership relation *inter sese*. It is probably not sufficient for us to show a state of facts upon which Mr. Arndt could be held liable to the creditors of the partnership. We propose to meet this question squarely and without evasion.

The question is, could Arndt, at the date of the fire, if one of the defendants in error had been guilty of a gross fraud upon the rights of the copartnership, sufficient to give copartners a right to a dissolution, have maintained a bill for a receiver and an accounting? Will it be doubted that he could have filed a bill to restrain such fraudulent acts and obtain appropriate equitable relief to which a partner only is entitled? In the event that any one of the parties refused to go on and complete the formation of the corporation, and it appeared that the firm had made $100,000 in this business in the mean time, what was Mr. Arndt's standing with reference to these profits? Could it be claimed that he was merely a creditor entitled simply to sue for the recovery of his $10,000 at law? And is it not perfectly apparent that he must have sued in equity, if at all, and that he would be entitled to a proportionate share of the profits? In the event of loss, is it not perfectly clear that Mr. Arndt's contribution was part of the capital stock trusted to the chances of the business, and that it must have been reduced on a final settlement by his proportionate share of any losses?

In other words, was Arndt a mere lender of money to the firm, or was he a contributor to its stock? If he was a lender of money, it would be natural to suppose that he was to get compensation for the use of his money; that there should be some agreement on the part

of the defendants in error to repay, and some time fixed for repayment. On the contrary, it expressly appears that there was neither a time fixed for repayment, nor any agreement whatever by the defendants in error to repay at any time. Not only there is no interest or other compensation agreed to be paid by them for the use of the money, but we find Mr. Arndt agreeing to pay interest upon *his* contribution of $10,000 from the first day of the preceding January. This was evidently to be done as compensation for his proportion of the expected profits of the business from and after the first day of January.

The question is, was that property, at the time of the fire, partnership property or not? And the decisive test of this question is whether Mr. Arndt's $10,000 was advanced as a loan up to the time of formation of the corporation, or whether, during that time, it was embarked in the ventures of their trade; whether it became part of the capital stock. It is beyond all question that his contribution went to pay for goods purchased by the firm, or to pay their debts, and was mingled through and through with the old stock, and that he was one of the losers by this fire.

We submit that his contribution was capital stock, and that he was a copartner, and joint owner of the goods insured.

The cases are uniform, even where a party makes no contribution to the capital stock, but simply renders services, if he shares in the the net profits as profits, he is a partner. Where he makes contribution to the capital, and shares in the profits as such in proportion to his contribution, the question has never been one which is even open to doubt.

It will doubtless be said that if Arndt was a partner, he was a partner in the profits only, and not in the property. Whatever plausibility this claim might have if Arndt only contributed his labor and skill, it is clearly unsound, and not supported by any precedent, when applied to a case like the one at bar, where Arndt contributes ten seventy-fifths of the capital stock and shares in the profits in proportion to his contribution. This contribution *per se* made him jointly interested in the property of the firm. When the assured all testify that Arndt added his $10,000 to their capital as a part of it, and was to share profits according to his contribution, they make him a partner *per se*, both as to creditors and as between themselves. We believe all the cases agree to this proposition. They bring themselves directly within the decision of this court in *Berthold* v. *Goldsmith*, 24 How. 261.

In that case this court said: "Partnership is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some one or all of them, in lawful commerce or business, with the understanding that there shall be a communion of profits thereof between them." "Whenever it appears that there is a community of interest in the capital stock, and a community of interest in the profit and loss, *then it is clear*

that the case is one of actual partnership between the parties themselves, and of course it is so as to third persons."

See *Beauregard* v. *Case*, 91 U. S. 140.

In the case of *Taft* v. *Schwamb*, 80 Ill. 290, the question was whether the property in profits, of which several were interested, was partnership property, or the individual property of Schwamb, and the court treated as decisive of its partnership character that it was delivered in as *capital stock*. The court conceded that it is undoubtedly competent for partners to stipulate that the ownership of the property shall remain in one, while the partnership shall only have the use of the property; but where property is delivered in by one of the partners as capital stock, this excluded the idea of any reserved ownership in him.

Whitcomb v. *Converse*, 119 Mass. 38, is one of the strongest cases to support this proposition. In that case C., W., B., and S. entered into a partnership for the transaction of a commission business. C. and W. contributed the whole capital. C. contributed such time as he was able to give. W., B., and S. each contributed all their time to the business, and each partner received one-fourth of the net profits. C. and W. received interest on the capital contributed by them. The partnership was afterwards dissolved and the business closed out at a loss. *Held*, that the capital constituted a debt of the partnership, to which all the partners were bound to contribute equally; and that if one of them was insolvent, the loss of capital was to be borne equally by the other three. Chief Justice Gray, in delivering the opinion, says: "Where, as is usual in an ordinary mercantile partnership, a partnership is created, not merely in profits and loss, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter. A corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who originally contributed it. * * * * The capital thereby became the property of the partnership, and the partnership, consisting of all the partners, became liable to Whitcomb and Converse, respectively, for the amount of capital paid in by them." *Livingston* v. *Blanchard*, 130 Mass. 341, is a similar case following the last. The leading English cases, *Ex parte Owen*, 4 De G. & S. 351, and *Syers* v. *Syers*, 1 L. R. App. Cas. 174, are very strong authorities to the same effect.

The case of *Syers* v. *Syers*, 1 L. R. App. Cas. 174, is precisely in point. In that case the appellant was the lessee of the Oxford Music Hall and Tavern. Being in want of a ready sum of money, he applied to his brother, the respondent, for an advance of 250 pounds. A paper was drawn up, and signed by the parties, in the following terms: "In consideration of the sum of 250 pounds this day paid to me, I hereby undertake to execute a deed of copartnership to you for one-eighth share in the profits of the Oxford Music Hall and Tavern, to be drawn up under the limited partnership act of the 28 & 29 Vict.

c. 86, called 'An act to amend the law of partnership.'" The money was advanced, and the speculation became successful. The case is precisely analogous to this, in that the deed of copartnership under the limited liability act was never executed. Here the contract to form a corporation was never executed. In the *Syers Case* the business ran for some time in the name of the appellant, and no deed of copartnership under the limited liability act was ever drawn up. In a suit for a receiver, and for an accounting of profits, and an interest, and a recovery of an interest, in the assets of the Oxford Music Hall and Tavern, it was held by the house of lords that the memorandum of agreement above quoted did not constitute the respondent a creditor of the appellant, but that, even before the organization under the limited partnership act, the parties were general partners *inter sese*, and joint owners of the assets and property of the concern, and jointly entitled to the profits, *and a decree for accounting was granted accordingly*.

Mr. Lindley says, (Lindley on Partnership, pp. 23, 24:) "The right of the lender is to be repaid his money, with such interest or share of profits as he may have stipulated for; and his right to a share of the profits involves a right to an account and to see the books of the borrower. *If he stipulates for more than this*, (*e. g.*, for a right to control the business, or the employment of the assets, or to wind up the business,) *or if his advance is risked in the business, or forms part of his capital in it*, he ceases to be a mere lender, *and becomes in effect a dormant partner*." It is to be observed that Mr. Lindley is here speaking of true partnerships, or partnerships *inter sese*, as distinguished from *quasi* partnerships, or those which exist as to third persons only.

The law is also accurately stated in the learned note to *Waugh* v. *Carver*, 1 Smith's Lead. Cas. 1308 and 1311. The doctrine touching this point is there laid down as follows:

"It must not, however, be supposed that furnishing goods or money for the prosecution of an enterprise, with an express or implied stipulation that the proceeds shall be applied to the payment of the debt, necessarily constitutes a partnership, and it is, on the contrary, well established that a vendor or agent may make such conditions as he thinks proper, as regards the source to which he is to look for remuneration, without becoming a partner, if the relation into which he enters is one of contract, and does not result in a joint interest or ownership."

"The reason of this distinction has been variously stated, but the most satisfactory explanation seems to be as follows: A partnership is a mutual agency. It will not, therefore, arise from a contract which does not authorize the parties to act for each other. Such an authority may, however, be implied where the agreement contemplates the creation of a *joint ownership, or interest, which is to be managed for the common benefit*. And so, where one man is to receive the fruits of the services or outlay of another, the relation of principal and

agent may reasonably be deduced. Hence the inference that an agent who shares the profits of a business is a principal as well as agent, or, in other words, a partner. Evidence that A. is to be paid out of the proceeds of an enterprise, which he is conducting with B., gives rise to a presumption that B. is also acting for A., and if so, there is a partnership. But the presumption may be repelled by showing that B. is the employer, and adopts this method of remuneration as more likely to stimulate the zeal of the agent. And if it can be made to appear with sufficient clearness that he is the sole owner, and that the remedy for a default on his part must be sought in an action of covenant or *assumpsit*, as distinguished from the assertion of a lien or right of ownership, the law will not imply a partnership contrary to the manifest intention of the parties."

"An agreement that an agent or a vendor shall be paid out of the proceeds of the business does not render him a partner, because he must still look to the personal responsibility of the vendee or principal, and is not entitled to a preference over his other creditors. *Chapline* v. *Conant*, 3 West Virginia, 507. But if he goes beyond this by stipulating for an interest in or lien upon the profits, the law will imply a partnership, although it is expressly provided that one shall not arise. *Berthold* v. *Goldsmith*, 24 Howard, 536, 543; *Fitch* v. *Harrington*, 13 Gray, 468, 474."

"And it is evident that if, as the case of *Wheatcroft* v. *Hickman*, *ante*, 1299, decides, the party sought to be charged as a partner must be a principal, no partnership can well exist when he is merely an agent. When, however, a party who renders services, or advances money to another, for the prosecution a particular business, looks beyond the *personal responsibility of the latter to the creation of an interest in the resulting property or its proceeds*, the transaction will be regarded as a partnership."

"Thus, in *Loomis* v. *Marshall*, 12 Conn. 69, the decision in *Everett* v. *Chapman* was said to rest on the ground that although the business was to be conducted and the sales made by the partners severally, each must have contemplated a specific lien on the proceeds in the hands of the others, as the only means of securing an equal apportionment of the profit and loss among all. And as the profits of those who contributed nothing in the first instance *were to be applied to the acquisition of a share in the capital*, the presumption was held to be that they all had an interest in, and not merely a right to, the proceeds of the business, and were consequently partners. *Vassar* v. *Camp*, 14 Barbour, 341. The law has regard to the substance of such transactions, rather than the form, and will not suffer the rule, that a participation in the profits constitutes a partnership, to be evaded by a stipulation that they shall be received as rent or salary."

Neither is it necessary that community of loss should be provided for in order to constitute a partnership, nor that there should be com-

munity of loss in fact in order to create a partnership property to be owned by the partners as such.

Bucknam v. *Barnum*, 15 Conn. 67.
Munro v. *Whitman*, 15 N. Y. Sup. Ct. 558.
Ex parte Langdale, 18 Ves. 301.
Gilpin v. *Enderby*, 5 B. & A. 954.
Parsons on Part. (3rd Ed.) pp. 43–59.
Hendrick v. *Gunn*, 85 Ga. 234.

(*b*) In these requests we have not only asked the court to charge the jury that the testimony establishes a partnership as a matter of law, but we have also asked a charge that this partnership relation being established, it necessitates a verdict for the plaintiff in error. This involves the question whether, if the assured admitted Arndt as a partner in the property, and he was a joint owner in the same with them at the time of the fire, the policy of insurance is thereby avoided. We maintain that the policy is avoided.

This case cannot be brought within the range of those decisions where it has been held generally, under dissimilar clauses, that a transfer by one of several joint owners, jointly insured, to another owner, who is also insured by the same policy, does not vitiate the policy. These cases proceed upon the theory that by such a transfer no stranger to the insurance is brought in as owner of the property; that is, as the insurance company had been satisfied to insure the joint owners, a transfer among such owners would not be presumed to be forbidden, but that the clause in question would be satisfied by applying it to a case like the present, where a new owner has been introduced. The theory is that the insurance company has the right to say with whom it will contract, and in whom it will rest its confidence; in whom it will repose the trust of bearing for it the moral hazard incident to the insurance. Any process by which a new party to the contract is introduced, by which the insured shifts the moral hazard from himself to a stranger, creates a new contract and a new relation which the company has not consented to assume.

Lockwood v. *Ins. Co.*, 47 Conn. 564, is not in point. The provision in that policy was that when the property should be alienated by sale or otherwise, the policy should thereupon be void. Quite a different provision from the clause in question. One tenant in common of real estate transferred his interest to a co-tenant, and it was held the policy was not avoided.

In a subsequent case of *Midley* v. *Ins. Co.*, 51 Conn. 222, the precise question here involved was decided, and the rule which we contend for fully sustained.

In the case of *Hoffman* v. *Ins. Co.*, 32 N. Y. 405, the policy contained a condition making it null and void if the property should be sold or conveyed. It was held that a sale by a retiring partner of his interest to his copartners, who were all jointly insured, did not render the policy void. This case is on all fours with the *Lockwood Case* in

Connecticut. The opinions in the above *Cases of Lockwood* and *Hoffman* draw a distinction between those cases and cases like the one at bar, and sufficiently show the opinion of both those learned courts, that a clause, such as occurs in this policy, would be violated by the introduction of a new partner into the property without the consent of the insurer.

Burnet v. *Eufala*, 46 Ala. 11, is a case which held a transfer by one partner to another, both being insured, was not a violation of the clause "if the said property shall be sold or conveyed, or the interest of the parties therein changed." This decision is clearly distinguishable from the case at bar. But Mr. Wood says that this case carries the doctrine further than was warranted by the cases to which it referred as authority, and further than the rules of fair construction would permit; that the interest of the parties was clearly changed when the part owner became the sole owner, or when one joint owner parted with any part of his joint interest in that property.

Wood on Fire Ins. p. 560, sec. 334.

In *Pierce* v. *Ins. Co.*, 50 N. H. 299, the supreme court of New Hampshire said: "Such a condition is inserted for the benefit and protection of the company against the risk of having careless or improvident persons substituted in the place of the original parties with whom they contract."

In *West* v. *Ins. Co.*, 27 Ohio St. 11, it is said that the chief reason for requiring such a stipulation is to guard against the introduction of a stranger.

Dix v. *Ins. Co.*, 22 Ill. 272, is opposed to the Alabama case, and it was there held that the insurers may be as greatly prejudiced by removing one to whom, with others, they had intrusted the guardianship of valuable property, as by the introduction of a stranger; that, therefore, under a clause similar to the one in question, a transfer from one partner to another vitiated the policy. To the same effect is *Barnes* v. *Ins. Co.*, 51 Me. 110.

Ins. Co. v. *Rice*, 23 Ind. 179.
Finley v. *Ins. Co.*, 30 Pa. St. 311.
Ins. Co. v. *Ricker*, 10 Mich. 279.

In *Day* v. *Ins. Co.*, 23 Barb. 623, it was held that an assignment from one partner to a stranger to the contract avoided the policy.

In *Wood* v. *Ins. Co.*, 31 Vt. 552, the court say: "When one partner sells to his associates, there can be no recovery by the old firm for a subsequent loss. Where there is a voluntary change of the firm, the insurance company may also well say that the new firm is not the party with whom they contracted."

Keeler v. *Ins. Co.*, 16 Wis. 523.
Ins. Co. v. *Hauslein*, 60 Ill. 521.
Lappin v. *Ins. Co.*, 58 Barb. 325.

In *Card* v. *Ins. Co.*, 4 Mo. App. 424, the court held that the introduction of a new partner was such a change of title and possession as to avoid the policy.

In *Dreher* v. *Ins. Co.*, 18 Mo. 128, the court held that where two insured partners dissolved and divided the property, converting the joint ownership into a several ownership, such a change of title would vitiate the policy.

Savage v. *Ins. Co.*, 52 N. Y. 502.
Pindar v. *Ins. Co.*, 47 N. Y. 114.
Briggs v. *Home Ins. Co.*, 88 N. C. 141.
Oakes v. *Ins. Co.*, 181 Mass. 164.

We submit that there is no ambiguity in the policy which can prevent the application of this rule. On this question we cannot better express our views than by quoting the language of Justice Miller, in passing upon this precise question on the first trial of this cause, (20 Fed. Rep. p. 657.) The learned justice said:

"A point raised by the plaintiffs in the construction of this policy is that the clause I have read last, in the fourth paragraph of this insurance policy, is a limitation and a qualification of the one I have first read. The first one is: 'And if the property be sold or transferred, or any change takes place in the title or possession, then the policy is void.' The last one is, that 'when the property has been sold and delivered, or otherwise disposed of, so that the liability of the assured has ceased, this insurance shall terminate.' I do not think that they have anything to do with each other. They relate to distinct phases of what may be done by the owners of the property after the insurance policies are executed. The latter does but little more than explain and qualify the universal principle of law, that when a man has insured property, and ceases to be the owner, or have any interest in it, although it may be burned during the life of the policy, he cannot recover anything, for the obvious reason that he has nothing to recover. He has no interest in the property; he has sustained no loss, and therefore can recover nothing. That has been decided over and over again. It is also one of the conditions of these policies, in order to prevent their assignment without the consent of the insurance company, that when a man sells and parts with his title and ownership of the property, he ceases to be insured, and has nothing to insure, and if the property is burned, it is somebody else's property. This provision in question has relation to that, and is intended to qualify, and, to some extent perhaps, to limit, the common law, for if it is sold and not delivered, he probably could recover.

"'When the property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured has ceased, this insurance upon such property shall immediately terminate.' This is rather for the benefit of the assured. A sale of

part of the property does not forfeit his right to insurance on the balance. Possibly a sale without a delivery, if delivery was essential, would not forfeit his insurance; but this relates simply to a sale of property in whole or in part, and is intended to qualify the rule of the law that would prevail without it.

"The other relates to a different affair: 'If the property be sold or transferred, or any change takes place in the title or possession.' Many changes may take place in the title and also in the possession, without a sale or transfer of the property to another party; for instance, a sale by one partner to another has been held by the courts not to be such a sale or transfer as is included in this policy, and for the very obvious reason that the possession does not change. It remains where it was; the title remains, perhaps, in the firm, although one member of the firm may have gone out. But the question we have to solve is, whether the introduction of a new partner into the partnership firm, whose goods are insured, is such a change as vests him with an interest which he did not have before, and vests another man with a right of control of the possession and to have charge of the property, and will avoid this policy. Without going on to cite the authorities, we are both of the opinion that this is such a change as by that language was intended to avoid or forfeit the policy.

"The sale or transmutation of the various interests between the partners themselves, and nobody else having the control, and leaving the possession where it was, does not invalidate the policy; but the introduction of a new partner, with an investiture of an interest in him which he did not have before, does avoid the policy."

II.

Under this head we propose to discuss the fourth assignment of errors.

On this point the court instructed the jury that the payment of money and the giving of note by Arndt to the plaintiffs, as shown, could not be construed as proving partnership relations between the plaintiffs and Arndt; and that the issue as to whether such partnership relations were formed must be determined from all the other testimony and facts in the case outside of said contract and payment under it; that said payment of money must not be construed as evidence of such partnership, but must be taken in connection with said contract, and as part performance thereof.

In giving this instruction we submit that the circuit court committed a manifest error. The learned circuit judge, we think, was led into this error by following too rigidly and technically the mere language which this court used in passing upon this case upon the former writ of error, without giving sufficient weight to the decided difference between the case as it now is and as it appeared before this court

then. The language which this court used then, upon the most familar principles, must be taken to have been used with reference to the record as it then appeared before the court. To show that such language, as applied to the facts as they at present appear, was erroneous, it is necessary to do little more than point out the wide difference between the two records.

Upon the first trial before his honor, Justice Miller, the court construed the written contract as establishing a partnership relation between the defendants in error and Arndt; and upon the theory that such relation was fully established by the contract, excluded all parol testimony.

There was no testimony in that record except the written contract, and the evidence of Arndt's payment of $10,000. That record appears in the present printed record, (pp. 27 to 31.) The written contract appearing in evidence, and providing for the payment of $10,000 by Arndt in a certain manner, and it also appearing, without other evidence, that the $10,000 was in fact paid at the time and in the manner provided by the written contract, it was natural for this court to say, and the statement was correct as applied to that record, that the payment of money was in pursuance of the written contract. But here a very different state of facts appears. Upon this trial, this court having decided that the written contract had sole reference to a future corporation, and no reference to a partnership relation, a large amount of parol testimony was taken to show that there was a *partnership relation between the parties prior to the formation of the contemplated corporation*. It may well be, as these defendants in error have positively testified, that this $10,000 was paid in, not only to secure Mr. Arndt a share in the corporate stock, but in order to entitle him in the mean time, and before the formation of the corporation, to a share of the net profits in the partnership business. We were entitled to have it submitted to the jury to say whether this money was not, as testified by the defendants in error, paid in for this double purpose. The circuit court, by withdrawing from the jury any consideration of this payment by Arndt, deprived the plaintiff in error of a great and almost controlling part of the *res gestæ* of the transaction.

The circuit judge on the last trial allowed the parol testimony which we have quoted to be introduced, and expressly charged the jury that it was competent to be introduced, and considered by them, except the testimony of the payment by Arndt. (Record, p. 46.) It is a general rule that the defendant in error cannot be heard to except in the appellate court to the rulings at the trial, and we therefore submit that the ruling of the trial judge, which appears by the record to be unexcepted to, allowing this parol testimony to be introduced and to go to the jury, must be treated as the law of this case upon this writ of error. However, if it should be in any way essential to establish the correctness of this ruling, it can be done by an unbroken line of authorities.

This rule is sustained by the court of Minnesota:

Van Eman v. *Stanchfield*, 10 Minn. 255.
Sanborn v. *Sturdevant*, 17 Minn. 200.

III.

It remains only to consider the assignment of errors numbered 5, 6, 7, and 8. If we are correct in our position under the first head of this brief, it necessarily follows that these instructions were erroneous.

The instructions, considered as an abstract proposition of law, may be correct; but we submit that they are incorrect and erroneous as applied to the facts of this case. The gist of these instructions is that although Mr. Arndt did have a share in the profits from January 1st up to and including the date of the fire, this would not necessarily make him a joint owner of the insured property. It is true, a man may be a partner in the profits of the firm property, but where he makes a contribution to the capital stock, and shares in the net profits in proportion to such contribution, and not as a salary for services, or as interest on money advanced to the firm, he can never be a partner in the profits merely. In such a case,—and we submit that this is such a case,—if he is a partner in the profits, he is also, by virtue of his contribution to the capital stock, a co-owner of the firm assets. Our positions on this question have been sufficiently elaborated on our first proposition.

The judgment should be reversed.

C. K. DAVIS,
C. W. BUNN,
Counsel for Plaintiffs in Error.

116-461

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1222.

THE LONDON ASSURANCE CORPORATION, PLAINTIFF IN ERROR.

vs.

EUGENE J. A. DRENNEN, FREDERICK W. STARR AND EDWARD D. EVERETT, PARTNERS AS DRENNEN, STARR & EVERETT, DEFENDANTS IN ERROR.

BRIEF AND ARGUMENTS OF DEFENDANTS IN ERROR.

L. J. C. DRENNEN,
Attorney for Defendants in Error.

SHAW & CRAY,
Of Counsel.

L. KIMBALL & CO. PRINT, MINNEAPOLIS.

IN SUPREME COURT, UNITED STATES.

THE LONDON ASSURANCE CORPORATION, Plaintiff in Error,

vs.

EUGENE J. A. DRENNEN, FREDERICK W. STARR and EDWARD D EVERETT, Partners as Drennen, Starr & Everett, Defendants in error.

Brief and Arguments of Defendants in Error.

Writ of error by defendant to the circuit court of the eighth circuit, district of Minnesota.

The defendants in error brought this action against the plaintiff in error in the State court to recover for a loss under two policies of insurance made and issued to them by plaintiffs in error. The cause was removed, with many others of the same character brought by the same plaintiffs against other companies, to the circuit court of the United States for the above named district, and came on for trial the first time, at the June, 1884, term of said circuit court, and for second trial at the June, 1885, term thereof.

The case is of much importance in respect of the character of questions and amount involved in it, as well as from the additional considerations that twenty-four other causes for large amounts, brought by the same plaintiffs, as above stated, are pending in said circuit court, for loss sustained by the same fire referred to in the complaint herein upon twenty-seven other policies, the most, if not all, of which probably involve the same questions presented by this record.

The complaint is in the ordinary form in such cases. See pages 3 to 18, printed record.

The defendant sets up two affirmative defences, viz:

First. Admitting the making of the policies, that the title and ownership of all the insured property, to-wit, a stock of merchandise, was in the plaintiffs at the time of the issuance of the policies, that a loss by fire had occurred, and that the plaintiffs had given due notice and made due proofs of such loss. It was alleged in the answer, that after the

making and delivery of the policies, and before the occurrence of the loss, a change of title in the insured property had taken place, by the admission into the firm of the plaintiffs as a partner of a fourth member, whereby it was averred that there had been transferred and assigned to him a joint and undivided interest in such property.

Second. Fraudulent over-valuation of the property destroyed, by the plaintiffs after the loss. See answer, pages 23 to 25, printed record.

The reply denies the allegations of the answer with respect to these defences. See reply, pages 18 and 19, printed record.

At the opening of the trial the defendant in the action expressly waived and abandoned the second of said defences, and relied solely on the first, expressly admitting all the facts necessary to constitute *prima facie* a cause of action in favor of plaintiffs for the whole amount claimed, and assuming the burden of establishing the first and only affirmative defence relied upon.

As to this defence it was developed at the trial and held by the court that two questions were involved, viz:

1st. Whether there had been such a change of title as was alleged in the answer, or more accurately, whether there had been, after the delivery of the policies, and before the loss, a transfer or assignment of *any* title or interest in the property insured?

2nd. Whether, if so, it operated as an entire forfeiture and avoidance of the policies?

This cause was once before in this court upon writ of error, from the first trial in circuit court, at which there was a verdict for the defendant, and the now defendants were plaintiffs, and the now plaintiff was defendant, in error.

It was argued and submitted on printed briefs at the October term, 1884, and the decision of this court is found in the 113th U. S. on page 51.

In accordance with that decision the cause was remanded to the circuit court for a new trial, and a second trial was had in September, 1885, at an adjournment of the June term, 1885, of said circuit court.

At the second trial there was a verdict for the plaintiffs. See pages 33 to 35, printed record.

A bill of exceptions was duly made and signed by Nelson, J., the presiding judge. See pages 35 to 46, printed record, and the entire charge of the court is found on pages 49 to 57 of printed record.

We find that the clerk has included in the printed record a large portion

of the proceedings upon the first trial: See pages 25 to 33 printed record, We do not understand why this has been done. It seems to us that these proceedings have no proper place in this record, and infer that they must have been inserted by mistake.

The principal question tried and submitted at the last of the trials was the same as upon the first, viz: Whether the plaintiffs, (defendants in error) had, after the issuance of the policies, and before the happening of the loss, formed a co-partnership relation with D. M. Arndt, so as to transfer and vest in him a joint title with them in the goods and property insured?

Upon the first trial this question stood alone upon the written contract made between the plaintiffs and Arndt, and the fact that Arndt had paid in to plaintiffs $5,000.00 in money and given his note for $5,000.00 pursuant to the terms thereof. The court, Justice Miller presiding, substantially took the case from the jury by instructing them that these facts (concerning which the evidence was undisputed) *did constitute Arndt a partner*, and did transfer to and vest in him a joint interest with the plaintiffs in the insured property, and constituted a change in the title thereto within the terms of the policies sued upon, and rendered them void.

This court held that such charge was error, and held that by the contract the parties appeared *ex industria* to have excluded the possibility of Arndt's acquiring an interest in or control over the insured property in advance of the formation of an incorporated company, and that "the requirement that Arndt was to be received into the business upon condition among others, that the company should be incorporated, and the further requirement that neither the name nor the character of the firm was to be changed until the proposed corporation was formed, cannot be satisfied by any other interpretation than one which excludes him from all control or management of, or legal interest in the property insured, prior to the formation of such corporation."

It will be seen that the case as now presented has, so far as evidence offered and received is concerned, only the additional testimony offered by defendant of what was claimed to be admissions of the insured, elicited by examination by the adjusting agents of the insurance companies, and the rebutting testimony of the plaintiffs, as found on pages 36 to 41 of the printed record.

This evidence was all submitted to the jury, and their determination and finding upon it must be deemed conclusive, unless there was some substantial error in the charge as given by the court, or in the refusal of the court to charge as requested by the plaintiff in error.

The counsel for plaintiff in error have not furnished us with a copy of their printed brief, but have kindly handed us a short statement of the points upon which they will rely in this court. They are as follows:

"*Points for Plaintiff in Error.*

I.

The court erred in not directing a verdict for the defendant; because the depositions of the plaintiffs and proof of the payment of money, etc., by Arndt made him a partner *per se* in assured property.

II.

The court erred in charging that the payment of money and giving of note by Arndt could not be considered by the jury as evidence on the question of partnership.

III.

The court erred in refusing the two special requests asked by the defendant.

IV.

The court erred in instructing the jury at plaintiffs' request, that 'Arndt might have an interest in profits without being an actual partner.' This may be and doubtless is correct as an abstract statement of law, but as applied to this case, where Arndt has *made* a contribution to a *joint stock* or *capital*, it is misleading and incorrect.

V.

That the court erred on the ground last stated in giving all the plaintiffs' special instructions. This results also from this principle which we affirm, that given certain facts from which the law *conclusively* deduces a partnership, there is no room left for making the question of intention, as one of fact, material."

I

The first is that arising upon the third request made by the plaintiff in error, which was refused by the court. It asked the court to charge that on the undisputed evidence in this case Arndt became a partner in the insured property with the plaintiffs, and that the verdict must be for the defendant.

We suppose that this request was based upon the assumption that the plaintiffs in the action did not deny that they said upon the examination by the adjusting agents what their written examinations disclosed, and that their statements upon said examinations conclusively proved that they had formed a co-partnership with Arndt. It is true that the plaintiffs did not deny the statements made upon such examinations, but we do not concede that such statements amounted to a concession of a partnership with Arndt. On the contrary, we claim that the plaintiffs all the way through expressly repudiated the conclusion or idea that Mr. Arndt became *a partner*. (Rec. p. 42 f. 49, p. 44 f. 51.)

It distinctly appears that these adjusting agents had been fully apprised of the exact nature of the arrangement between the plaintiffs and Arndt by the delivery to them of the written contract which had been made between them, before making their sworn statements to the adjusters, and Mr. Drennen expressly states that he told them that he supposed that paper would show the exact nature of the relation between the plaintiffs and Arndt much better than he, Drennen, could state it.* The efforts of the

* And in the beginning of each deposition taken by the insurance adjusters and relied on by the plaintiff in error, it is clearly stated that such deposition was to be taken in connection with "any and all papers presented to the different insurance companies in proof of the loss." (Record p. 36 f. 38, p. 38, f. 41, p. 39, f. 43.)

the confidential relations of partner with Arndt, but were willing to unite their property with his money, to be owned by a corporation in which all would become stockholders according to the amounts respectively contributed to its capital stock."

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"It may be that Drennen, Starr & Everett were unwilling to establish the confidential relations of partner with Arndt, but were willing to unite their property with his money, to be owned by a corporation in which all would become stockholders according to the amounts respectively contributed to its capital stock."

It is claimed by the plaintiff in error, that this evidence shows that there was to be a participation in profits by Arndt from January 1st, 1883, and that this alone would constitute Arndt a partner in and joint owner of the insured goods. We think it is evident that this supposed participation in profits from January 1st, was not a participation in profits as profits, but was merely a basis of calculation as to the relative interests which the plaintiffs and Arndt should have in the stock of the contemplated corporation when formed: That is to say, upon the basis of the inventory previously taken January 1, 1883, the plaintiffs had $65,000.00 net value, as against the $10,000.00 which Arndt was to contribute. That ratio of relative values was to be kept good. If the plaintiffs had made any profits after January 1st, up to the time of the formation of the corporation, that profit would go in to make up the capital stock of the corporation, and to offset that Arndt was to pay interest at eight per cent on his contribution of $10,000.00 from January 1st. That was the manner in which the parties agreed that the average between the respective contributions of the parties to the capital stock of the corporation should be kept good. This was substantially what was agreed in the written contract.

The plaintiffs said to Arndt, "We took an inventory of our assets January 1, 1883. We then had $65,000.00 net value. We have made some profit since. When we come to form this corporation, whatever profit we have made since January 1, 1883, will go in with the $65,000.00 net value which we then had and will increase the assets of the corporation so much. Of this you will get the benefit when you shall receive your shares of stock, but to offset this you shall pay eight per cent. interest on your contribution of $10,000.00 from January 1, 1883; the object being that when we shall form the corporation and issue the stock, you shall have as nearly as practicable 10-75 in value of the capital stock, i. e. you $10,000.00, and we $65,000.00, of which last named amount of stock Drennen will have one half or $32,500.00, Starr one fourth or $16,250.00, Everett one fourth or $16,.250.00. But if it shall turn out that we did not have the full net value of $65,000.00 January 1, 1883, by reason of losses occuring before that time, then we put in what we have, and you your $10,000.00, and the respective stock interests in the corporation shall be accordingly."

But even if there was to be a participation in profits as such from January 1, 1883, this would not necessarily constitute Arndt a partner or joint owner *in the insured goods*. The court below so instructed the jury, and this was doubtless correct.

In Lindley on partnership, page 19, we find the following:

"It has often been said that community of profits is the test of partnership. This, however, is not accurate, whether persons are really partners or not is a question of intention to be decided by a consideration of the whole agreement into which they have entered, and ought not to be made to turn on one or two only of the clauses of it."

And in story on partnership, page 78, note: "In America after some conflict among the authorities the better opinion seems to have prevailed, and it is now generally accepted that mere participation in profits, even the net profits, though it may *prima facie*, will not in itself necessarily create a liability as a partner."

In the case of Hankey *vs.* Becht, 25 Minn. 212, it is held that "One may be a partner in the profits of a business, without being a partner or part owner in the property with which it is conducted."

And see story on partnership par. 54-56;
Parsons on partnership, page 47;
Wish vs. Small, 1 Campbell 331;
Ex parte Hamper, 17 ves. jr. 403-4;
Blanchard vs. Coolidge, 22 pick. 151.

In Lycoming Insurance Company, *vs.* Borringer, 73 Ill., 230, we find a case which seems to be very nearly in point. The case holds as follows:

"Facts which will make persons partners as to third persons will not always make them partners between themselves. Thus the mere fact that a person puts a certain amount of money into a business and permits his name to be used as a partner *will not make him a joint owner of the goods used in the business unless that was so agreed and understood at the time he so placed his money and permitted the use of his name.* It does not render the goods partnership property so as to effect the rights of the original owner to recover on a policy of insurance issued to him."

It will, perhaps, be claimed that there was also an express admission of the partnership relation in the introduction of Arndt to Iott and Hughson, but as to this there was a conflict of testimony between their witnesses and the plaintiffs Drennen and Starr, and we may fairly presume that the jury have found this issue against the plaintiff in error:

But if such introduction was made and even if Drennen thought Arndt was a partner in his firm, this would not and could not make him one, because Starr testifies (p. 43) that the written contract "was the only contract between the plaintiffs and said Arndt relative to a business

connection," while Everett testifies (p. 44) it "was the only contract made between the plaintiff's firm and said D. M. Arndt so far as he knew." So that even if Drennen believed Arndt was constituted a partner by this contract and even attempted to take him into the business for that reason, it is an elementary principle of law that a new partner cannot be admitted into a firm without the consent of all of the members of the firm, and there is nothing to show that either Starr or Everett ever assented to any other arrangement than that shown by the written contract, while their positive testimony, as well as that of Drennen, clearly shows they nor either of them ever made or assented to any other contract or arrangement with Arndt. What witness, what evidence or what circumstance contradicts them? We fail utterly to find it, and claim the general rule "that when a fact is sworn to by a witness of fair fame and who is uncontradicted by other testimony or any circumstances in which he may stand, the jury are not at liberty to disregard his testimony."

Harding v. Brooks, 5 Pick. 248.

Wait v. McNeil, 7 Mass. 261.

is applicable.

Again, "persons may not be partners although they call themselves so."

Story on Partnership, 7 ed., p. 45, note.

See also, Radcliff v. Rushworth, 33 Bear. 484.

Oliver v. Gray, 4 Ark. 425.

Ridgway v. Phillips, 1 Comp. M. & R. 415.

And particularly, Vice v. Anson, 7 B. & C. 409.

And in Lindley on partnership, Vol. 1, page 45, it is said: "Admissions are not necessarily conclusive, and little weight ought to be allowed to them if it is shown that they were made under erroneous suppositions." See also page 96 *id.*

The question to be determined upon the evidence was, whether the plaintiffs and Arndt had formed a partnership *as between themselves* in, and become joint owners of the insured property? The solution of this question must depend upon the ascertainment of the *intention* of the parties.

Parsons on partnership, page 18, and cases cited.

Gill vs. Kuhn, 6 S. & R. 337.

Lindley on partnership, Vol. 1, page 18, and notes and cases cited.

Wait's actions and defences, Vol. 5, page 114.

In Story on partnership, page 45, we find the following: "It may be laid down as a general rule, that in all such cases no partnership will be created between the parties themselves if it would be contrary to their real intentions and objects. And none will be created between themselves and third person, if the whole transactions are clearly susceptible of a different interpretation, or exclude some of the essential ingredients of partnership."

We contend that the question of what was the real intention of these parties was properly left to the jury upon this evidence. The court would not have been justified in taking that question from the jury, unless the evidence was so clear and convincing as to leave no room for doubt that such intention was as it was claimed to be by plaintiff in error.

It seems to the defendants in error as if this defence was a bold and unwarranted attempt to force upon these parties a partnership relation contrary to their own intentions *for the sole purpose of shielding these insurance companies from a liability justly incurred*, and notwithstanding the parties have put their own contract and understanding in writing in such way that this court declared that they could not have intended any such thing as the plaintiff in error contends for; still it asks the court to construe these examinations by the adjusting agents as conclusive of the intent to form a copartnership, when it is apparent that they are entirely reconcilable with the idea that no partnership was ever intended.

Assuming for the sake of the argument that there was evidence *tending* to show that a partnership relation was intended, we think the true rule may be stated to be that even when a question of intent arises upon a conceded state of facts, if reasonable men might arrive at different conclusions, it must be submitted to the jury.

Can it possibly be said that upon this evidence the only conclusion to which any reasonable man could come, must be that a partnership relation was intended to be formed between the plaintiffs and Arndt, and that it was meant by them to transfer to and vest in Arndt a joint interest and title in the insured property? We do not think so.

II

It is further contended by the plaintiff in error in its second point that the court below in its general charge excluded from consideration by the jury the fact of the payment of money by Arndt as evidence of the establishment of a partnership, and that this was error.

This portion of the charge of the court below was evidently based upon its understanding of the effect of the decision of this court when this case was before it upon the former writ of error. See general charge page 52 folio 67-68 printed record. That understanding doubtless was, that it was made distinctly to appear then, as it is now, that the payment of the money by Arndt was only a performance of one of the conditions of the written agreement which had been made between the plaintiffs and Arndt. That that agreement with all of its conditions not only did not establish a partnership relation between them, but had no tendency in that direction, in as much as it expressly and conclusively appeared upon the face of that agreement that it was not intended to establish that relation. The question then was, and now is, whether the fact that Arndt delivered to plaintiffs $5,000.00 in money and his note for $5,000.00 tended to prove the present establishment of a partnership relation between them and the transfer to Arndt of a joint ownership in the insured property? Whether it did so tend must depend upon the manner in which and the understanding upon which the delivery of the money and note was made. If it was an isolated act or fact having no connection with any express agreement, to be taken and considered along with other acts or facts having a tendency to show the intent to establish a partnership relation, then it should be considered: If on the other hand it was merely a thing done in pursuance of, and as part performance of an express written agreement the whole and entire scope of which was, not to establish a partnership relation, but expressly to negative any such result or intention, then it should not be considered; and the whole question as to whether a partnership relation was established must be remitted to and depend upon evidence apart from the express agreement or the performance of any of its conditions, and tending to establish the existence of *some other* agreement.

This is as it seems to us, consistent with the decision of this court as indicated in the following language found therein:

"The requirement that Arndt was to be received into the business upon the condition, among others, that the company should be incorporated, and the further requirement that neither the name nor the character of the firm was to be changed until the proposed corporation was formed, cannot be satisfied by any other interpretation than one which excludes him fron all control or management of, or legal interest in, the property insured, prior to the formation of such corporation.

"Arndt, in effect, agreed to pay Drennen, Starr & Everett $5,000.00 on

June 14, 1883, and a like sum on January 1, 1885, with interest on each sum from January 1, 1883, until paid, *for the privilege of becoming, to the extent of such payments, a stockholder in a corporation thereafter to be formed*, whose capital stock should represent all the effects and rights of that firm, as of the date from which Arndt was to pay interest (less any loss arising from the non-payment of goods previously sold) increased by the $10,000 which Arndt agreed to pay into the old firm. Such was the whole extent of the agreement.

"The instruction of the court below proceeded upon the ground that the payment by Arndt in cash and notes of the amount which he agreed to pay, and their receipt and entry upon the books of the firm to his credit, gave him an interest as partner in the business; whereas such facts only established the performance of some, not of all, the conditions prescribed; for, by the agreement, the formation of the proposed corporation was expressly made a condition, with the others named, to Arndt's becoming interested in the business.

"In our judgment looking at the whole agreement, the parties did not contemplate a partnership, and none was ever established between them. The agreement looked only to a corporation, the payments and other things specified being in preparation for its ultimate formation, which was an adequate, as it was the actual consideration; consequently, there was, prior to the loss, and under the most liberal interpretation of the policies, no change in the title or possession of the property, nor any transfer thereof, that avoided the policies."

If, as this court has said, Arndt agreed to pay and did pay this money and gave this note for the privilege of becoming, to the extent of such payment, a stockholder in a corporation thereafter to be formed, whose capital stock should embrace the effects of the firm of Drennen, Starr & Everett, and the said $10,000.00 which Arndt so paid, how can it be said that such payment tended to show the establishment of a partnership relation?

The court says that that was the performance of one of the conditions of an agreement, an essential requirement of which was that before Arndt should become interested in the business a corporation should be formed; that the agreement looked only to a corporation, *the payments and other things specified being in preparation for its ultimate formation, which was an adequate as it was the actual consideration.*

In addition to this Mr. Drennen testifies positively that the payments

were made "in pursuance of the written contract," which testimony is wholly uncontradicted by other testimony or any circumstance, and we again beg leave to remind the court of the rule before quoted laid down by the supreme court of Massachusetts in Harding's Books, 5 Pick. 248, and Wait *v.* McNeil, 7 Mass. 261.

The court below then was justified in saying to the jury that Arndt's payments were made "in pursuance of the written contract," as sworn to by Drennen, and as part performance of that contract as stated in his charge to the jury.

We submit then that the court below was right in saying that the payment of this money, being expressly and solely for and in furtherance of another purpose which was inconsistent with the intent to form a partnership, could not be considered as evidence of such intent, and it would have been error for the court to have permitted the fact of such payment to go to the jury as evidence of an intent contrary to the general intent of the written contract.

The case, then, fairly went to the jury upon the testimony outside of this written agreement and whatever was expressly done under and in performance of it, and it was for the jury to find from such other evidence whether there was any other agreement or understanding differing from that contained in the writing, establishing a partnership relation.

The plaintiffs testified that they never made any other or different agreement. See bill of exceptions, printed record, page 42, folio 48, and page 43, folio 49, and page 44, folio 51, printed record. The court fairly left this question, as to any other parol or verbal agreement, to the jury in an instruction given at the request of the plaintiff in error. (See page 53, folio 69, printed record).

The argument on the part of the plaintiff in error doubtless will be, that although the payment of the money by Arndt was not of itself sufficient to establish the partnership relation, still it was a fact to be considered with other evidence having a tendency to establish that relation.

But the difficulty with this reasoning is, that the written agreement which provided for this very payment is found to be entirely inconsistent with any such conclusion, and the construction which has been put upon that agreement is, that the provision in it for the payment of money by Arndt does not tend to establish such partnership relation, because the consideration upon which such payment was to be made was one which expressly negatived any intention on the part of the contracting parties

to establish such relation: therefore the plaintiff in error should not be permitted to isolate the fact of the performance of that condition of the agreement from the other provisions of it, and construe it with other evidence *dehors* the written agreement for the purpose of establishing the relation which the written agreement expressly negatives, by declaring that no change shall take place in the name or character of the firm of Drennen, Starr & Everett until a corporation shall be formed.

In this connection we beg leave to repeat a passage in our former brief in this case, found on page 8 thereof;

"It seems to us, that the important and essential inquiry is, what did the parties to this agreement intend by the agreement itself? It is conceded that what was subsequently done, to-wit, the receipt of the mon and note by plaintiffs, was done under and pursuant to this agreement, and *for the only purpose of carrying out its terms.* It cannot therefore be claimed that this was done for the purpose to add to, or vary in any way the intention of the parties in the making of the agreement, or that its effect was to change or vary the original intent in any particular. If the parties did not by that agreement intend presently to admit said Arndt into the firm of plaintiffs and form a partnership *inter sese*, then they did not intend that the receipt of the money and note should have that effect."

III.

There was no substantial error in the refusal of the court to give the first and second requests of plaintiff in error as shown on page 53, folio 70, of printed record. The requests were mere statements of abstract propositions, the correctness of which as such, in the unqualified way in which they were put, may well be doubted; but it is sufficient to say that they are not applicable to the facts in this case, because it appeared by undisputed evidence that the contribution made by Arndt was not upon any such terms, but was under and in pursuance of the written agreement and only for the purpose of carrying out the conditions thereof, and such agreement, as before shown, expressly negatived the idea of a partnership relation.

IV.

It is also contended by the plaintiff in error that the court erred in instructing the jury that Arndt might have an interest in the profits,

without being an actual partner or joint owner in the property of the plaintiffs in the action. We have discussed this somewhat in our first point, but will add a few other considerations.

It will not be questioned that as an abstract proposition of law this is correct, but it is claimed that as applied to this case it is misleading, because Arndt had made a contribution to a joint stock or capital. But the contribution which Arndt had made was not a contribution to the capital stock of the firm of Drennen, Starr & Everett, but as this court has said, it was the consideration which he paid for the privilege of becoming a stockholder in a corporation to be formed and for which he was to receive, not an interest in the firm of Drennen, Starr & Everett, but stock in such corporation when the same should be organized. Therefore, we say that if in the final adjustment of the stock interests he was to receive the benefit of whatever profits might be realized from the business of Drennen, Starr & Everett after January 1, 1883, still it would not follow that he became a partner or joint owner in the goods of Drennen, Starr & Everett, and would present a case in which he might share profits as a consideration for his agreement to pay in for the use of Drennen, Starr & Everett, his contribution to said stock in advance of the time when such corporation should be formed. The consideration upon which he so paid in that money in advance, was not the present vesting in him of any interest or title in the property of Drennen, Starr & Everett, but, as before said, the privilege of becoming a stockholder in a corporation to be formed, and of *then* and *not till then*, having such interest in said property as might be represented by his holding of such stock.

V.

The court gave the 6th, 7th, 8th and 11th requests of the plaintiffs in the action. (See pages 55 and 56 of printed record.)

The contention of the plaintiff in error as stated in the memoranda furnished us seems to be, that the granting of these requests was erroneous for the reason that if there are given certain facts from which the law conclusively deduces a partnership, there is no room left for making the question of intention as one of fact material.

Is not this a begging of the whole question by the plaintiff in error? Are the *certain facts* from which the law conclusively deduces a partner-

s'ip given? On the contrary, has not the question as to whether those facts exist been left to the jury, and has not the jury found that they do not exist?

This is but another way of putting the proposition contained in the 3rd request of the plaintiff in error, viz: that it was error for the court below to refuse to instruct the jury to render a verdict for the defendant.

But we cannot concede that, when the question is whether there existed a partnership *inter sese*, the element of actual intent of the parties as a matter of fact can ever be eliminated, for it is that and that alone which determines the question.

In Gill *vs.* Huhn, 6 S. & R. 337, *supra*, we find the law laid down by Gibson, J., as follows:

"That there is a distinction between partnership as respects the people and partnership as respects the parties, is an elementary principle * * * so plain that its only difficulty is in its application to particular cases. When the agreement is silent, there is often room for doubt as to the precise relation in which parties stand to each other * * * but where they explicitly declare there is to be no partnership, it is unnecessary to argue further, for among themselves the law permits them to determine their respective interests by their own stipulations; it is a matter with which third persons have no concern.

And in Wait's actions and defences, vol. 5, page 114-15, it is said:

"If parties expressly declare that they do not mean to become partners, the courts *neither consider the express contract nor their acts as creating a partnership in fact, although otherwise clearly established.*"

Kerr vs. Potter, 6 *Gill. (Md.)* 404.
Gilpin vs. Endsberg, 5 *B. & Ald.* 954.

We will cite also upon the general question the following cases:

Clemons v. Haddock, 13 *N. H.* 185.
Polland v. Stanton, 7 *Ala.*, 761.
Rice v. Amlin, 17 *Mass.*, 197.
Pillsbury v. Pillsbury, 21 *N. H.*, 93.
Rondle v. State, 49 *Ala.*, 14.
Wicklof v. Dudley 40 *Ill.*, 406.
Listner v. Milliken, 47 *Ill.*, 178.
Hubbell v. Wolff, 15 *Ind.*, 204.
Statten v. Ham, 31 *N. Y.*, 321.

From an examination of the whole record can it be said that the verdict

is other than should have been rendered in view of the plaintiffs' admitted *prima facie* right to recover and all the testimony submitted to the jury? If a different verdict had been rendered on the evidence, would it not have been the duty of the court to set it aside as being contrary to the evidence? The former of these questions we think must be answered in the negative and the latter in the affirmative. If we are correct in these conclusions, and if no improper evidence was admitted and no proper evidence excluded, (and the memoranda of errors to be assigned handed to us by plaintiff in error, complains of no errors of these kinds,) then we apprehend this case will be governed by the following rules promulgated by this court and this notwithstanding errors may have been committed in other particulars by the trial court:

"If from any reason appearing in the record it is clear that a plaintiff in error, who was also plaintiff below, cannot recover in the action, the court will not determine whether error was committed in instructions given to the jury respecting other parts of the case. To warrant the reversal of a judgment there must not only be error found in the record, but the error must be such as may have worked injury to the party complaining."

Brobst v. Brock, 10. Wall. 519.

"Though there may be plain error in a charge, yet if the record present to this court the whole case, and it be plain from such whole case that if the court had charged rightly, the result of the trial would have been the same as it was, this court will not reverse."

Decatur Bank v. St. Louis Bank, 21. Wall. 294.

"When it plainly appears on the face of a record that the judgment below was right, it will not be reversed for a technical error which worked no injury to the plaintiff in error."

Mobile & Montgomery R. vs. Jurey 111 U. S. 585.

See also

Pleasants vs. Fants, 22 Wall. 116, and cases there cited.

VI.

But if it shall be found that upon the submitting of this question of partnership, there was such substantial error as would entitle the defendant in the action to a new trial upon that question, we shall ask the court to consider whether even if there was a partnership relation established between the plaintiffs in the action and Arndt, that would have the effect to render void this insurance.

We claim that it would not, that under ordinary rules, in the absence of any express conditions of forfeiture, the plaintiffs still retaining an insurable interest in the goods insured may still recover. The question is, whether under the conditions of these policies the fact, if such was the fact, that Arndt became a partner with plaintiffs in their business, would avoid the policies? If it would not, then the error, if any, in the instructions of the court upon the question of partnership or no partnership would be *error without prejudice*, and the verdict should still stand.

There are, as we claim, in these policies two conditions to be considered as bearing upon this question. The first is, "if the property be sold or transferred, or if any change takes place in title or possession, * * * * by voluntary transfer or conveyance, * * * * then this policy shall be void?"

The second is, "when property shall have been sold and delivered or otherwise disposed of so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate."

The court below on the first trial of this cause as well as on the last trial thereof, held these to be independent conditions, relating to distinct phases of what may be done by the owners of the property after the insurance policies are executed, meaning, if we understood the line of reasoning adopted, that while the first clause was intended to embrace either an entire sale or transfer of the whole property, or such a conveyance or transfer as would affect any change in the title of the whole, the second was doubtless meant to refer only to sale and delivery or other disposition of *portions* of the property insured. The argument of counsel for defendant was that it had particular reference to daily sales out of a stock of goods, and we understood the court as substantially adopting this view. It was accordingly found that the former clause exactly filled the circumstances of this case, while the latter had no relation whatever to it.

With due deference we may be permitted to say, that this seemed to us like an exceedingly liberal construction in exactly the wrong direction. In view of the manifold and complicated conditions which the astute officers of insurance companies have been accustomed to insert in the forms of policies, which they present to the unwary merchant or manufacturer, who pays his money for a supposed indemnity against loss by fire or flood, the courts have of late years felt compelled to rigidly enforce certain wholesome rules of construction, appertaining es-

pecially to this class of contracts, in which one party for a money consideration received, writes in its own words and delivers to another an agreement of indemnity. While recognizing to the fullest extent the right of insurers to frame their policies in the form which they may deem requisite for their protection against all frauds, and risks not fairly contemplated, the courts have, with great unanimity insisted, that these policies shall be plain and unambiguous in their terms, and that all conditions therin which are intended to vest in the insurer a right to declare a forfeiture of the indemnity, which has been purchased and paid for, shall not be in any wise doubtful, misleading, or of double meaning, and that stipulations in a policy are to be construed most strongly against the insurer and liberally in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity, which in getting the insurance it was his object to secure. Mr. May in his excellent work on insurance uses the following significant language:

"No rule in the interpretation of a policy is more fully established, or more imperative and controlling, than that which declares that, in all cases, it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity which in making the insurance it was his object to secure. When words are without violence susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted. While courts will extend all reasonable protection to insurers, by allowing them to hedge themselves about by conditions intended to guard against fraud, carelessness, want of interest and the like, they will nevertheless enforce the salutary rule of construction, that as the language of the condition is theirs, and it is therefore in their power to provide for every proper case, it is to be construed most favorably to the insured. Thus, if a stipulation be ambiguous, and no light can be thrown upon it in accordance with the received principles of law, from extrinsic evidence, the doubt is resolved against the party by whom and in whose favor the stipulation is made. The words of a promise with its exceptions and qualifications are to be considered as those of the promisor, while those of a representation on which the promise is founded are the words of the promisee."

May on Ins. par. 175.

Citing Westfall v. Hudson River Fire Ins. Co., 2 Duer, 49.

Cropper v. Western Ins. Co., 32 Penn. St. 351.

See also

Woods on Ins., Sec. 57.

The supreme court of Minnesota, in Chandler *v.* St. P. F. & M. Ins. Co., 21 Minn. 87 and 88, uses the following language: "The language of the condition is the language of the company, and for any ambiguity in its terms the company is responsible. If the company has seen fit to express itself in terms that require interpretation, it cannot complain if any doubt as to the meaning of the condition is resolved in favor of the assured. The rule that words are to be taken most strongly against the party using them, is more applicable to the conditions and provisos of policies of insurance than to almost any other instruments. These policies are wholly prepared by the company issuing them, and should be drafted with the most scrupulous exactness. They should be absolutely free from ambiguity. 'A policy ought to be so framed that he who runs can read. It ought to be framed with such deliberate care that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it.'" Citing

Anderson v. Fitzgerald, 4 H. of L., cases 484 510, and numerous other cases, both English and American.

This court, in the case of

Insurance Co., v. Norton, 6 Otto, p. 242,

uses the following language:

"Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made. * * * * Courts should be liberal in construing the transaction in favor of avoiding a forfeiture."

See also

Ins. Co. v. Eggleston, 6 Otto, 572.

In the case of

Mosdor v. American Life Ins. Co., 111 U. S. p. 341,

this court says: "When a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligation of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company

against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself. Citing

Grace v. American Ins. Co., 109 U. S. 278.
National Bank v. Ins. Co., 95 U. S. 673.

With this principle of construction in view, let us consider for a time the conditions of the policies in question. We have before said that the construction of the court below seemed to us a liberal construction in the wrong direction. By this we mean, that it seemed such a construction in favor of the insurer and against the insured. We think we may fairly assume, that both of these conditions have reference to the same general subject, viz: *the alienation of the insured property.* The language of the first is, "if the property be sold or transferred, or any change takes place in title or possession." The second is, "when property has been sold and delivered or otherwise disposed of so that *all* interest or liability on the part of the assured therein named has ceased." It seems to us evident that both of these clauses are general in their application to *the insured property as a whole*, and that although they might well enough be held, in a case of a sale, transfer or delivery, or change in title or possession of any part, to refer the part so alienated, there is nothing in the language used by which we must or can say that the last *any more than the first* refers to such alienation of a part. The words "sold or transferred" in the first, and "sold and delivered" in the last, are equivalent expressions. The words "or any change takes place in title or possession" in the first, and "or otherwise disposed of" in the last, may also fairly be held to be equivalent expressions. Our interpretation is, that the first and the last conditions, having equally general reference to the question as to what effect alienation of the property shall have upon the policy, the concluding clause of the last, to wit, "so that *all* interest or liability on the part of the assured herein named has ceased," may and ought to be held as a declaration of the final intention, and as defining explicitly what character of alienation shall have the effect to *wholly* avoid the policy, viz, such as shall divest the *entire* title and interest of the assured.

If it be answered that this would be the effect without any *expressed* condition, may it not be fairly replied that the insurers have seen fit to incorporate expressly in their policy the condition which the law would

annex, viz. that whenever the assured ceased to have *any* insurable interest in the property, the policy should cease to be operative!

If we concede that the first condition, standing alone, would embrace such an alienation of an undivided joint interest as is claimed here, it might further be said that the weight of authority is, that upon such a condition, standing alone, such alienation avoids the policy. But we answer, it does not stand alone. If the idea expressed in the first condition is that *any change* in the title shall *wholly* avoid the policy, the company has seen fit to insert another condition, relative to the same subject of alienation, which is inconsistent with the idea that *any change* shall have that effect, and is only consistent with the idea that it is *only such change* as shall wholly divest the insurable interest and title of the assured, that shall have the effect to *wholly* avoid the policy.

The question seems to be, might not the ordinary business man wanting to insure his goods, having placed before him this form of policy, reading both of these conditions, fairly infer that the intention was that so long as he retained any insurable interest in the goods insured, his policy would afford him indemnity for the loss of that interest!

If it is so, then the case comes clearly within the spirit and letter of the foregoing authorities.

We do not understand, that we are to be held with rigid exactness to the technical construction, which an astute lawyer or a learned judge might, after careful consideration put upon these conditions, but that, if the terms require interpretation, if there be any doubt as to their meaning, an interpretation will be adopted and that doubt resolved in favor of the assured, so as to avoid the possibility that he might have been caught by ambiguous or doubtful expressions. Is the court prepared to say that the policy is framed with such scrupulous care and exactness that, in the language of the court in Anderson *v.* Fitzgerald, *supra*, "he who runs can read," its meaning to be, that a sale to another of an undivided joint interest in the property insured shall have the effect to *wholly* avoid his policy!

In the case of Burkhart *v.* Ins. Co., Sup. Court Penn. Reporter, vol. 16, p. 499, we find the following: "Where a party uses an expression of his liability having two meanings, one broader and the other more narrow, and each equally probable, he cannot, after an acceptance by the other contracting party, set up the narrow construction. Citing 2d Wharton on Con., sec. 670. Hence when an insurance company tenders a policy to a party seeking to be insured, and uses in the policy am-

biguous words, these words will be held to have the meaning most favorable to the insured, as the presumption is that on this construction he took the policy, and as the company could have avoided the difficulty by being more specific." Citing

Foukes v. Ins. Co., 3 B. & S. 917.

"It is now well recognized as a general rule, that where a stipulation in, or an exception to a policy of insurance emanating from the insurers is capable of two meanings, the one is to be adopted which is more favorable to the insured." Citing

Allen v. Ins. Co., 85 N. Y. 473.

"In case of doubt as to the meaning of terms emanating from an insurance company, they are to be most strongly construed against the insurer." Citing

Wilson v. Ins. Co., 4 R. I. 156.
Bartlett v. Ins. Co., 46 Me. 500.
Ins. Co. v. Slaughter, 12 Wall. 404.
Ins. Co. v. Burroughs, 19 P. F. Smith (Penn.) 43.

We submit finally upon this question, that, while this defendant in attempting to guard against liability in case of alienation of the insured property, and to provide for a forfeiture of the contract in case of such alienation, may have made use of one condition or form of language, which, if standing alone might, if it be found that plaintiffs have transferred a joint and undivided interest and title in the insured property to a stranger, subject plaintiffs to an entire forfeiture of their policy, have in the same policy, and with respect to the same subject matter made use of another condition and form of language, which at least with equal certainty declares, that it is an alienation of the *whole* title and interest of the insured which shall have such an effect. Under the principles laid down in the foregoing authorities there would seem to be but little if any doubt about which of these seemingly conflicting conditions, (if indeed they are so), should have effect in this case. If the first condition means what is claimed for it by defendant, it was in itself sufficient to *cover all and every case of alienation.*

Why insert the last? It had some purpose. We cannot reject it. Was the purpose of it a final declaration of the true intent of what had gone before, or was it to confuse the policy holder? It cannot indeed be said that the first condition is *necessarily* inconsistent with the last, because the words "any change in the title or possession" might quite as well refer to a complete and entire change or transfer of the whole

title, as to such a change as would be effected by the conveyance of an undivided interest.

We have heretofore reasoned upon the assumption, that under a sole provision in a policy of insurance, providing that any change in the title of the insured property should avoid the policy, such a transfer as is claimed in this case might be within such condition. This, however, we are not to be understood as conceding. Upon a careful examination of the text-books we have found no case cited which so declares. The defendant's counsel in the court below cited but one, viz: the Malley Case recently decided by the supreme court of Connecticut; Malley *v.* A. F. & M. Ins. Co., reported Ins. Law Journal, vol. 13, p. 38. The case of Hoffman *v.* Ins. Co., 32 N. Y. 405, was referred to as intimating that such was the rule, but this question was not in that case. The only question there was as to whether a transfer of his interest by *one partner to another* avoided the policy, and it was held that it did not. And such is now the generally accepted doctrine as shown by that case; and see Woods on Insurance, p. 564, *et seq.*, and notes and cases cited.

The Malley Case above referred to doubtless holds, that the introduction of a new partner in such a way as to transfer to him an interest in the insured property would, under such a sole condition, avoid the policy. So far as we can ascertain this question has never been before this court.

We will suggest that such a change of title would scarcely bring a case within the principle, which is said to underlie the object of insurance companies in introducing such clauses into their policies. It is said that such object is "that the interest shall not change so that the assured shall have a greater temptation or motive to burn the property, or less interest or watchfulness in guarding and preserving it from destruction by fire."

See May on Ins., p. 299.

Ayres v. Hartford Ins. Co., 17 Iowa, 176.

It would seem somewhat difficult to conceive why an owner of property with insurance upon it, should have less interest in preserving it, or greater temptation to burn it simply because he has happened to convey a small interest in it to another, whom he has associated with himself as a partner, especially when the seller's pecuniary interest in the property is not diminished.

Policies not unfrequently contain express conditions providing that a change in the partnership of an insured firm, or a conveyance of an un-